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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
VS.) NO. CR 17-00609 (VC)
)
JOSE INEZ GARCIA-ZARATE,)
)
Defendant.)
)

San Francisco, California
Wednesday, January 8, 2020

TRANSCRIPT OF PROCEEDINGS

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6 BY: **J. TONY SERRA**
7 **ATTORNEY AT LAW**

8
9 Also Present: Carol Rhine-Medina, Spanish Interpreter
10 Daniel Navarro, Spanish Interpreter

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1 Wednesday - January 8, 2020

10:05 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Please be seated. Calling Case
5 Number 17-CR-00609, USA versus Jose Inez Garcia-Zarate.

6 Counsel, please step forward and state your appearances
7 for the record.

8 **MR. CHENG:** Good morning, Your Honor. Eric Cheng and
9 Kevin Barry on behalf of the United States.

10 **THE COURT:** Good morning.

11 **MS. BELYI:** And good morning, Your Honor. Maria Belyi
12 and J. Tony Serra here on behalf Mr. Garcia-Zarate, who is
13 present before the Court, in custody, and being assisted by a
14 Spanish-speaking interpreter.

15 **MR. SERRA:** Good morning.

16 **THE COURT:** Good morning.

17 Good morning, Mr. Garcia-Zarate.

18 Okay. Let me see. Obviously, there are a number of
19 things --

20 **THE CLERK:** We have the interpreters.

21 **THE COURT:** Oh, I'm sorry. The interpreters need to
22 make an appearance. I apologize.

23 **INTERPRETER RHINE-MEDINA:** Carol Rhine-Medina,
24 certified Spanish interpreter. I have been sworn in the
25 matter.

1 **INTERPRETER NAVARRO:** Daniel Navarro, certified
2 Spanish interpreter. I have been sworn in the matter as well.

3 **THE COURT:** Hello.

4 A number of things to talk about. I wanted to, maybe, get
5 a couple of very small things out of the way first.

6 One is that there was a request somewhere, I don't know if
7 it was in the pretrial -- joint pretrial statement or something
8 like that, for the creation of an audio backup of testimony
9 given in a different language.

10 We're not able to do that. Our audio system is unreliable
11 enough as it is that it's not something that we are going to
12 use as part of a formal part of the trial. We try to use it
13 for civil proceedings, and not even civil trials but, you know,
14 argument in civil cases and stuff in lieu of court reporters,
15 but it's too unreliable to be using for trials.

16 So if you have any concerns, either side has any concerns
17 about the -- you know, the translations given by the
18 interpreters, by the Court-appointed interpreters, the thing to
19 do is to hire your own, quote/unquote, check interpreter -- I
20 think is what it's called -- where they can alert you where
21 they think there has been an interpretation problem and then
22 you can make an objection about that and then we can discuss
23 that outside of the presence of the jury. So that's one small
24 issue.

25 Let me see if -- there are other, a couple of other small

1 things we can get out of the way before we jump into motions in
2 limine and jury instructions and stuff like that.

3 Oh. I want to make -- let me just make one thing clear to
4 the Government. Any prior statement you want to use, any video
5 you want to use any audio you want to use, I want a complete
6 paper and electronic copy of the transcript for everything.

7 So, for example, there is -- let me see. So first -- I
8 can't remember what it is. I think it might be the
9 interrogation or it might be the ABC interview. I can't
10 remember.

11 We have not been provided a full electronic copy of the
12 transcript of that, and I don't see how I can assess whether,
13 you know, the snippets that you want to introduce are
14 appropriate to introduce without having the entire transcript.
15 And I want both electronic copies and paper copies.

16 So make sure we have all that as soon as possible.

17 **MR. CHENG:** Yes, Your Honor.

18 **THE COURT:** For anything that you want to introduce.

19 **MR. CHENG:** Yes, and I believe --

20 **THE COURT:** Obviously, the video, if it's video
21 recorded or audio, if there is audio, I need all of that as
22 well.

23 **MR. CHENG:** Yes, Your Honor. We'll provide that.

24 We have provided the police interview transcripts and
25 video, but we have not provided the complete copy of the ABC

1 video transcript, and we'll provide that.

2 THE COURT: And the ABC interview, by the way, is
3 almost certainly going to be excluded. We can talk about it
4 further, but that -- to me, almost certainly would be
5 inappropriate to introduce at trial. But we'll -- we can talk
6 about that further.

7 Let me see. Other little things. What about exhibits?
8 Like all the photos, for example, that you want to use. Do we
9 have those yet?

10 MR. CHENG: No, Your Honor. The exhibits in their
11 entirety will be provided, I believe, on Friday, under your
12 standing order. So those will all be delivered to the Court in
13 a complete set, in binders as well as disks for any digital
14 media.

15 THE COURT: Okay. And as you can tell from the motion
16 in limine rulings, some of the photos that you were intending
17 on using, you're not going to be able to use. But, you know,
18 perhaps in the discussions that we have here, in the discussion
19 we have here today, it will become apparent that there are some
20 remaining disputes on whether some of the photos can be used.
21 And it might make sense to get us those earlier, so we can look
22 at the photos and assess. But, anyway, we can get to that.

23 Another small thing, I would like to set, you know, there
24 was a previous trial, right, and there was -- I assume there
25 was also prior testimony by a number of these witnesses at,

1 like, grand jury testimony, or preliminary hearing testimony in
2 the state court proceeding, or something like that; is that
3 right?

4 **MR. CHENG:** There is testimony from a preliminary
5 hearing, as well as the trial testimony from a subset of the
6 witnesses we intend to call in the state court proceedings;
7 that's correct.

8 **THE COURT:** Okay. One of my trial pet peeves is
9 impeaching witnesses with prior testimony. Usually, it comes
10 up in civil trials with, you know, prior deposition testimony
11 or whatever. I would like to set some ground rules for this
12 trial for how to impeach witnesses with prior testimony, and I
13 want to see if anybody has any objections to those ground
14 rules.

15 I think, you know, common problem in trials is that
16 lawyers don't know how to properly impeach witnesses with prior
17 testimony. So they will -- the lawyer might start off by
18 asking a question about their prior testimony, instead of just
19 asking the question, and only if they answer the question
20 inconsistent with the answer they previously gave will the
21 lawyer raise the prior testimony. That's how it's supposed to
22 be done.

23 Oftentimes lawyers just go straight into asking people
24 about what they said in their prior testimony. That's not
25 appropriate.

1 Also, sometimes lawyers will ask a witness a question,
2 "Were you walking on the left side of the street?"

3 And the witness says "Well, no, I think actually I was
4 walking on the right side of the street."

5 And then the lawyer will paraphrase the witness' prior
6 testimony, attempt to paraphrase the witness' prior testimony,
7 which the lawyer believes is incomplete or inconsistent. And
8 that also, I think, is not an appropriate way to do it.

9 I think the only appropriate way to impeach a witness with
10 prior testimony is to ask the witness a question. "Isn't it
11 true that you were walking on the left side of the street?"

12 And if the witness says "No, I think I was walking on the
13 right side of the street," then you say "Your Honor, I would
14 like to read" -- or you can of course ask the witness "Didn't
15 you testify on this prior occasion," and "Weren't you under
16 oath," and "You know, did you attempt to answer all the
17 questions truthfully," without getting into the substance of
18 it.

19 And the witness says "Yes," then you say "Your Honor, I
20 would like to read page 323, lines 4 through 17 of the
21 transcript of the proceeding that took place on such and such a
22 date.

23 And I have a copy of that. You make sure that I have a
24 copy of that in front me. You give me an opportunity to look
25 at it. You give opposing counsel an opportunity to look at it

1 and make any objection to reading that. And only after that do
2 you read it. And you read it verbatim. You don't try to
3 paraphrase what they said.

4 Then, if you want to ask the witness follow-up questions
5 about it, after having read it into the record, you can.
6 Although I find most good lawyers, good trial lawyers, don't do
7 that.

8 And, I mean, maybe all this sounds rudimentary to you, but
9 in my five years on the bench, I have almost never seen a trial
10 lawyer do it correctly.

11 And what always happens is it results in confusion and the
12 witness doesn't know what the lawyer is talking about. There
13 is a confusing back and forth. There are objections and it
14 wastes a bunch of time and causes the jury to be confused.

15 And so I want to avoid that, because I anticipate that
16 there may be a number of instances in which witnesses are being
17 impeached or the lawyer attempts to impeach the witness with
18 prior testimony. And so I want to establish firm ground rules
19 about how that happens.

20 Does anybody have any objection to that, or any questions
21 about that?

22 **MR. SERRA:** Your Honor, what the Court has said is the
23 norm and, obviously, we will follow it. But let me postulate a
24 situation where, perhaps, it won't be necessary to ask the
25 question.

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1 Let's hypothesize -- I'll make it a different kind of an
2 issue -- that the prosecution asks a witness "What color was
3 the car?" We'll pretend it's a getaway car.

4 And a witness says, you know, "Green."

5 And then the prosecution says "Well, light green or dark
6 green?"

7 And he says "Light green."

8 "The whole car was green?"

9 "The whole car was green."

10 Then I come up. I have a prior inconsistent statement
11 where the witness previously had said the car was yellow. Do I
12 have to ask all over again, or can I use the foundation that's
13 already been laid by the prosecution? And immediately -- and I
14 understand, you know, giving it to you, having you look at it
15 and showing how it's inconsistent, et cetera. That's all easy.
16 But do I have to reask the questions in that situation?

17 **THE COURT:** No. But you can say "You testified on
18 direct" --

19 **MR. SERRA:** Yes. Got you.

20 **THE COURT:** -- "that the car was green." That's all.

21 **MR. SERRA:** That's all, yes.

22 **THE COURT:** Does anybody have any concerns or
23 questions about that?

24 **MR. BARRY:** No, Your Honor. I think we will have --
25 there may be some debate about whether something is

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1 inconsistent. And if the Court and we have the transcript that
2 they are trying to use to impeach, that will be helpful.

3 THE COURT: That's right. That's why the -- if you
4 think there is a possibility that you are going to impeach a
5 witness with prior testimony, you have to make sure that I have
6 that prior testimony in front of me, and that the opposing side
7 has that prior testimony in front of them. That's your
8 responsibility.

9 And it's your responsibility if you plan to do it.

10 And if you haven't done that, then you're not going to get
11 to impeach them with your -- you're not going to get to impeach
12 the witness with the prior testimony.

13 Everybody has to be ready. The other side has an
14 opportunity to object. Oftentimes, there is nothing
15 inconsistent about the prior testimony, and the opposing side
16 says "Sure. Go ahead; read it."

17 And that's fine if you want to do that. Or if you want to
18 object, that's fine.

19 You know, I have, in the past, shut down attempts to read
20 prior testimony that is not inconsistent. But, you know,
21 usually we just let the jury -- usually the jury knows whether
22 it's inconsistent or not. And the jury gets very annoyed if a
23 lawyer tries to pretend that something is inconsistent when
24 it's not.

25 But anyway, I want though -- it sounded like nobody has

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1 any concerns or objections about those being the ground rules
2 for impeaching witnesses with prior testimony.

3 **MR. BARRY:** No concerns by the Government, Your Honor.
4 But two further questions.

5 What if -- this is more from the defense perspective, I
6 think. But what if the defense is trying to elicit something
7 that wasn't brought up on direct and that -- but was in prior
8 testimony. Like, you know, we focus narrowly on the witness
9 statement and the defense wants to get into something
10 additional that was testified to in state court. What would be
11 the mechanism for that?

12 **THE COURT:** What I just said. You ask them the
13 question on -- you ask them a question on cross-examination and
14 they give an answer. And then, if that answer is inconsistent
15 with their prior testimony, then they can impeach them with the
16 prior testimony.

17 **MR. BARRY:** And then, the other wrinkle is, if we have
18 video of the person's prior testimony we want to play the
19 video. I mean, you'll have the -- Your Honor and the defense
20 will have the clips, but I guess it includes the, sort of, same
21 procedure.

22 **THE COURT:** "Your Honor, I wish to play video of
23 page 323, lines 4 through 17 of the prior testimony given on
24 such and such a date."

25 So you're not saying "the prior state court trial."

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1 You're saying "the prior proceeding," you know, "that took
2 place on such and such a date."

3 And then we have -- I have a written transcript in front
4 of me that you've provided. They have a written transcript in
5 front of them. We can look at what you're proposing to play,
6 and then I either say you can play the video or you can't play
7 the video.

8 **MR. BARRY:** Okay. Thank you.

9 **THE COURT:** Anything else?

10 You look like you're thinking.

11 **MR. SERRA:** I always look like I'm thinking. That's
12 because I have a difficult time thinking.

13 **THE COURT:** Okay.

14 **MR. SERRA:** This is what I was thinking: The way the
15 prosecution framed the issue is that something different is
16 going to be gone into and here, you know --

17 **THE COURT:** In cross.

18 **MR. SERRA:** -- it's clear with you. I assume that if
19 there is an objection, it's out of the scope of direct, you
20 would entertain that objection, rule on it, before we get to
21 whether or not he is going to use it.

22 **THE COURT:** Yeah.

23 **MR. SERRA:** Okay.

24 **THE COURT:** Now, but on that, I mean, as I think I
25 said on the order that I put out on the motions in limine, I

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1 mean, you know, I don't want a situation where you are forced
2 to recall a government witness because you felt like something
3 was beyond the scope on cross.

4 In other words, if you want to get into it, if you want to
5 get into something with them, get into it with them so that we
6 don't have to call them later on.

7 **MR. SERRA:** But then would that be calling my own
8 witness out of order so that I couldn't cross, I would have to
9 use only direct?

10 **THE COURT:** No. My -- in other words, the way I tend
11 to do it at trial is to be fairly loose on, sort of, the
12 subject matter of cross-examination, so that we don't have to,
13 you know, call the witness again.

14 **MR. SERRA:** I completely agree. It saves a lot of
15 time.

16 **THE COURT:** So when in doubt, I tend to overrule those
17 objections about beyond the scope of direct.

18 **MR. SERRA:** I understand. As long as I get cross and
19 not take them on -- I have had judges say that: Well, okay if
20 you want to get it in, something different, it's your witness
21 you have to do only direct.

22 **THE COURT:** No. I mean, I suppose there are some
23 lines that could be crossed where I might think that that needs
24 to happen, but I never felt the need to do that.

25 **MR. SERRA:** Okay.

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1 **THE COURT:** Okay. Anything else on that issue? No?

2 Okay.

3 I'm trying to decide if it makes more sense for the
4 Government to give me a list of the witnesses they intend to
5 call now, and a description of their testimony because maybe
6 that would inform our discussion of the motions in limine, or
7 whether we should get right into the motions in limine.

8 Why don't you rattle off your witnesses and give me a
9 description of what they are going to testify to?

10 **MR. SERRA:** Your Honor, are they giving this list in
11 the order they are going to be called; is that part of your
12 request?

13 **THE COURT:** I think it's probably too early to make
14 them do that but, to the extent they can, it would be nice.

15 **MR. CHENG:** Yes, Your Honor. At this time the
16 Government currently intends to call the following witnesses --
17 and we'll do it in alphabetical order.

18 First, Linda Abuan from the San Francisco Police
19 Department Criminalistics Laboratory.

20 **THE COURT:** How do you spell that last name?

21 **MR. CHENG:** A-b-u-a-n.

22 **THE COURT:** Okay.

23 **MR. CHENG:** She will be -- we expect that she will be
24 qualified as an expert in gunshot residue analysis and will
25 testify about the analysis she conducted on the gunshot residue

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1 in this case.

2 THE COURT: Okay. And the gunshot residue from --

3 MR. CHENG: From the defendant.

4 THE COURT: Okay.

5 MR. CHENG: Next there are two officers that we may
6 call; one may obviate the need for the other. The first is
7 Andrew Bryant from the San Francisco Police Department. And
8 the second is Brett Grendell, from the San Francisco Police
9 Department. Both --

10 THE COURT: What was the second name?

11 MR. CHENG: I'm sorry, Your Honor. Brett Grendell,
12 G-r-e-n-n-e-l-l.

13 THE COURT: Okay.

14 MR. CHENG: Both officers were present at the very
15 moment that the defendant was arrested on June 1st, 2015.

16 THE COURT: Okay. What are they going to testify
17 about?

18 MR. CHENG: They will testify as to what they heard
19 from other police officers, the reason for looking for the
20 defendant, and then the actual process of finding the
21 defendant, arresting him, and securing the defendant for
22 gunshot residue.

23 MR. SERRA: I'm taking that the hearsay is not offered
24 for the truth of the matter asserted, only to show what the
25 officers did as a consequence of hearing it.

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1 **THE COURT:** That's how I took it as well.

2 **MR. SERRA:** We'll get to that later.

3 **THE COURT:** You don't need to object or even seek
4 clarification now.

5 **MR. SERRA:** It's too early.

6 **THE COURT:** You'll have plenty of opportunity to do
7 that. Okay.

8 And that evidence, present at the moment they arrested
9 him, why they were looking for him, how does that relate to
10 what you need to prove in this case?

11 **MR. CHENG:** Well, Your Honor, with respect to the
12 issue of possession of the firearm, again, the very first part
13 of the story is there was a shooting. There were eyewitnesses.
14 And these are some of the additional witnesses we'll describe.

15 There were eyewitnesses that were drawn to observe at the
16 scene that there was a shooting, because of the shooting. And
17 these eyewitnesses observed and specifically identified the
18 defendant in relation to the shooting. So that identification
19 was provided to police. And then the police, in turn, were
20 specifically looking for this potential shooter.

21 That explains -- that's the reason to explain why they are
22 looking for the defendant, as well as what they were doing in
23 relation to specifically searching for the defendant at this
24 particular time.

25 And then, of course, the arrest itself and the bagging of

1 the defendant's hands for gunshot residue is relevant to
2 possession, as well as gunshot residue, we submit, will be
3 relevant to the issue of possession as well.

4 **THE COURT:** Okay. I assume that putting aside the
5 bagging and the gunshot residue -- which was obviously relevant
6 and seems like it's going to be a disputed issue from what I
7 can tell -- the stuff about there was a shooting, they were
8 looking for him, people identified him, none of that is
9 disputed in this case; right?

10 **MR. SERRA:** I'm going to be objecting to hearsay, you
11 know. If someone tells an officer you know, "I saw X, Y, and
12 Z" --

13 **THE COURT:** No, but what I'm saying is -- I know there
14 may be a hearsay issue in there. But I'm asking a more
15 foundational question, which is: Nobody is going to argue, I
16 take it, that there wasn't a shooting and that they weren't
17 looking for Garcia-Zarate, and nobody is going to argue that it
18 was not legitimate to be looking for Garcia-Zarate.

19 I mean, none of that is in dispute in this case; right?
20 And so --

21 **MR. SERRA:** We had a motion to suppress on it, but
22 that's been ruled on. So at this juncture, no dispute.

23 **THE COURT:** Right. In the trial, there is not going
24 to be dispute on is it.

25 **MR. SERRA:** Yes.

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1 **MR. CHENG:** Your Honor, two more issues that these two
2 arresting officers will testify to was the clothing of the
3 defendant, as well as the appearance of the defendant matching
4 these descriptions, as well as the specific location of the
5 arrest being close -- very close in proximity to the shooting
6 itself.

7 **THE COURT:** Yeah, but all of that sounds -- virtually
8 everything you described seems designed to prove that it was
9 Garcia-Zarate and not somebody else. Right?

10 virtually everything you just described seems designed to
11 prove that this is the right guy. But nobody disputes that
12 this is the right guy.

13 **MR. BARRY:** Well, Your Honor, we --

14 **THE COURT:** It's just a question of -- and nobody
15 disputes that he, on some level, handled the gun -- right?--
16 and that the gun went off --

17 **MR. SERRA:** Wait a minute. He may have only handled
18 the packaging, and not really --

19 **THE COURT:** I understand that. I was including that
20 not on some level he was -- you know, the gun went off when it
21 was -- I don't want to say, when it was in his possession --

22 **MR. SERRA:** In his fleeting, transitory --

23 **THE COURT:** Right. The gun went off when it was in
24 his fleeting possession/non-possession.

25 It was him. Right? I mean, there is no dispute that it

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1 was somebody else sitting on that chair with a gun who, you
2 know, who either inadvertently or intentionally caused the gun
3 to go off. So the vast majority of the testimony that you're
4 describing, it's not in dispute.

5 **MR. BARRY:** Your Honor, we don't know if it's in
6 dispute until closing argument. If two of our witness get hit
7 by a truck, and we can't introduce photographs, they are free
8 to say, "There is a rush to judgment. They got the wrong guy."

9 **MR. SERRA:** Come on. That's absurd.

10 **THE COURT:** Please, hold on. Don't interrupt him.

11 **MR. BARRY:** They found some homeless guy and decided
12 to --

13 **THE COURT:** Let's assume -- let's say not be too
14 fanciful about what's going to happen. Okay?

15 Let's assume -- and remember there will be opening
16 statements, and there is, of course, presumably, unless they
17 waive it, there is to go to be an opening statement from the
18 defense and they are going to say what happened. And
19 presumably it's going to be something similar to the trial
20 that's already happened.

21 You know, it seems to me that, if that happens, it's --
22 there is little, if any, need for the majority of what you
23 described from the officers. I mean, other than, yeah, there
24 was, you know, we got -- we were told to look for this guy and
25 we found him and put a bag over his hands -- and get straight

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1 to the residue stuff. Right?

2 I mean, you -- you know, I'm getting the sense from the
3 papers that you filed in this case and some of the stuff that
4 you're saying today, that you're -- and some of the witnesses
5 that you have proposed to call, that you're wanting to retry
6 the murder case.

7 **MR. BARRY:** Absolutely not, Your Honor. We are
8 focusing on basically a 45- to 55-minite framework of time, and
9 that's it. We're not -- you know, we're not asking the
10 officers what they had for breakfast, or what they were doing,
11 or what they think about homeless people or immigrants or gun
12 crimes in San Francisco.

13 **THE COURT:** I didn't say any of that.

14 **MR. BARRY:** But we have to be able to tell the story
15 of what happened. And, you know, having -- precluding any
16 aspect of the arresting officers of, I was looking for a person
17 wearing this description, based on this photograph. And
18 where -- before that, you know, getting to where that
19 photograph came from. We have to be able to say, "This is why
20 this happened."

21 And it won't take long. It will not take long. The
22 arresting officers may be on for 15 minutes. So there is no --
23 there is nothing cumulative.

24 **THE COURT:** Okay.

25 **MR. BARRY:** There is no waste of time. But the

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1 Government has to be able to tell a coherent story of that hour
2 of time, you know, from the hearing of the gunshots to the
3 defendant's arrest.

4 **THE COURT:** You have to be able to tell a coherent
5 story that allows the jury to consider the possession charges.
6 It's not a coherent story about a murder.

7 **MR. BARRY:** No.

8 **THE COURT:** You don't have to tell a detailed or
9 coherent story about a murder.

10 So the only -- there may be issues about hearsay or
11 something. It doesn't seem inappropriate to call these
12 witnesses. But I initiated this discussion to make very clear
13 that you -- that the witnesses need to know that they -- what's
14 important and what's not, and what needs to be gone through
15 quickly and what is in dispute.

16 And I am not going to allow the witnesses to dwell on the
17 details of Kate Steinle's death. And I will interrupt and cut
18 them off if they do that.

19 **MR. BARRY:** We are absolutely not doing that. And you
20 may have seen that we are not getting into the ballistics of
21 the skip off the pavement. We don't want to call the coroner.
22 We don't want to put her photographs --

23 **THE COURT:** They may want to get into the skip off the
24 payment.

25 **MR. SERRA:** Absolutely, yes.

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1 **THE COURT:** But that's up to them.

2 **MR. BARRY:** They are free to do that. But we are not
3 retrying the murder case. But the fact is that it happened,
4 that the defendant possessed a firearm. One of the ways he
5 possessed was by pulling the trigger.

6 And not to -- I'm not making light of this in any way, but
7 I think if we look at it in a different way, it may be helpful.

8 If Mr. Steinle brought and we'll -- I appreciate the
9 Court's order on that, I have got some requests along those
10 lines. But, if Mr. Steinle brought a life-size sculpture to
11 the Pier, and wanted to take backgrounds pictures and, like,
12 was an art exhibit and wanted to take pictures with the Bay in
13 the background of a sculpture, the fact that there was a
14 shooting and the bullet was taken from that sculpture is
15 directly relevant to the defendant's possession, especially his
16 possession of the bullet that was taken from that.

17 We're not trying to sensationalize that. We're not
18 focusing on this murder.

19 **THE COURT:** I didn't understand that. But Mr. Steinle
20 is not testifying and that ruling is final.

21 **MR. BARRY:** No, I appreciate that.

22 **THE COURT:** Okay.

23 **MR. BARRY:** But the only thing I request is that there
24 are photographs that are relevant and the video that's
25 relevant; so I ask to be able to be able to admit some of

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1 those, like one photograph and some commentary on the video,
2 that his testimony would be necessary for.

3 But, if we can obviate that by allowing one or two
4 questions and then the admission of the photograph, we
5 appreciate -- we appreciate the ability not to ask Mr. Steinle
6 to have to testify.

7 So -- but the story is going to be very focused. But the
8 fact that there was a shooting caused officers to respond and
9 caused them to look for him in this area --

10 **THE COURT:** I understand that.

11 **MR. BARRY:** Okay. But we are not trying to
12 sensationalize it. We are not trying to get into the
13 defendant's intent. But we do intend to establish that he
14 pulled the trigger, for whatever reason, because that's the
15 principal way that he handled this weapon.

16 **THE COURT:** I understand that. But who else?

17 **MR. CHENG:** Your Honor, next we have a few
18 eyewitnesses by the Pier. That's Erin Carpenter, as well as
19 Maria Moreno.

20 **THE COURT:** I want to go one by one.

21 What's Erin Carpenter going to testify to?

22 **MR. CHENG:** Erin Carpenter and Maria Moreno were both
23 at a hotel across the street from the Pier. They will testify
24 to hearing the gunshot drawing their attention to what was
25 happening outside, observing the defendant leaving the scene,

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1 and in light of seeing the defendant leave the scene in the way
2 he did, take photographs of the defendant and bring those
3 photographs to the police.

4 **THE COURT:** Okay. Who else?

5 **MR. CHENG:** We also have two eyewitnesses who were
6 physically at the Pier; that's Danny and Michelle Lo.

7 **THE COURT:** Hm-hmm.

8 **MR. CHENG:** They will testify to being at the Pier at
9 the time of the gunshot, being able to identify the fact that
10 there was someone there that ended up getting shot, as well as
11 identifying the fact that the defendant was there at the Pier
12 where he was, and the fact they shared photographs that they
13 took of the defendant to police.

14 **THE COURT:** Okay. Now, from the -- I haven't been
15 through the entire state court trial transcript yet, but from
16 the bits that I have reviewed it looked like Danny and Michelle
17 Lo's testimony was used by the Government to primarily, if not
18 entirely, to establish that he -- that -- to attempt to
19 establish that Mr. Garcia-Zarate committed murder, that he
20 intended to shoot Steinle or intended to shoot someone at the
21 Pier.

22 So I need to hear a little more from you. Again, what you
23 have described is -- what you have described about their
24 testimony is something that's not in dispute, that Steinle got
25 shot, that a gun went off, that Steinle got shot, that

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1 Garcia-Zarate was on the Pier, that he was sitting there in the
2 chair spinning around, or whatever they say he was doing.

3 Right?

4 There is -- none of that is in dispute. So what is it
5 that they are going to testify to that will assist the jury in
6 determining whether he knowingly possessed the firearm?

7 **MR. CHENG:** Right, Your Honor.

8 And that is not our intent to be proving a homicide case,
9 just as Mr. Barry said. The fact is that these -- I'm sorry,
10 these eyewitnesses were at the Pier. They observed what they
11 saw. They also observed the defendant leaving the scene in a
12 fashion in which -- that compelled them to bring photographs
13 that they took of the defendant to police. And where the
14 defendant --

15 **THE COURT:** Okay. I get that.

16 **MR. CHENG:** What he was wearing. What the person who
17 deceased, what she was wearing as well.

18 **THE COURT:** Why does it matter what Kate Steinle was
19 wearing? How is that relevant to this?

20 **MR. BARRY:** That's for the video, Your Honor. Where
21 they were on the Pier is critical --

22 **THE COURT:** You can't see what she is wearing in the
23 video.

24 **MR. BARRY:** You can see light and dark. So one of
25 the -- Mr. Steinle was wearing something white --

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1 **THE COURT:** But I don't understand. It's not disputed
2 that -- there is no dispute that Kate Steinle was shot and
3 killed on the Pier. You can see it on the video. You can see
4 the person fall. You can see Kate Steinle fall. And you can
5 see Mr. Garcia-Zarate walking away.

6 Why do you need Danny and Michelle Lo to come describe
7 what Kate Steinle was wearing?

8 **MR. BARRY:** Because, if there is no foundation to say
9 that these people in the video are the Steinles, the defense
10 can argue anything at closing.

11 I mean, we can say it's not disputed, but if we don't
12 establish the evidence through whatever means, through
13 witnesses, or through stipulation, or somehow, then we haven't
14 proven our case. And, again, we're not going to get into, you
15 know, some -- that the defendant looked angry or --

16 **THE COURT:** Well, the defendant -- will the defendant
17 stipulate that the video shows Kate Steinle being shot on the
18 Pier?

19 **MR. SERRA:** I have to think about that and discuss it.

20 **MR. BARRY:** You know *Old Chief* does also indicate that
21 the Government cannot be forced to stipulate away its case,
22 especially when we're talking about 10 minutes of testimony.
23 But we're not trying to establish whether the defendant had bad
24 intent, or what -- why he pulled the trigger.

25 **THE COURT:** I don't understand why these people need

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1 to come testify about what Kate Steinle was wearing. I don't
2 understand that.

3 **MR. BARRY:** Because it has to do with -- it
4 corroborates everything that -- that this is the guy, that this
5 is the person involved in the gunshot. He is walking off the
6 Pier. He is running or walking off the Pier.

7 Michelle Lo could see where he was. She saw where
8 Kate Steinle fell. She saw where the defendant was and she put
9 it together that this guy was involved. And that's why she
10 went to the police.

11 And that is significant because the defense could -- is
12 free to argue, depending on what the Government's case is or
13 how limited it is, they are free to argue that they got the
14 wrong guy. At the end of the day, they can say "The Government
15 didn't prove that my client ever possessed a firearm. He was a
16 poor" --

17 **THE COURT:** They are going to say that, but I don't
18 think they are going to say -- I don't think there has been any
19 indication from the prior trial or anything anybody has said in
20 this trial that the defense plans to say that they got the
21 wrong guy.

22 **MR. BARRY:** They don't have to announce their defense.

23 **MR. SERRA:** I'll tell you right now, we're not going
24 that route. We're going not going to say it was somebody else.

25 **MR. BARRY:** And if things change during the trial and

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1 we don't prove our case for some reason, if Mr. Serra sticks to
2 that, it would be ineffective assistance. So we can't be
3 prevented from proving the case based on what we all think the
4 defense might do, or what the defense might be.

5 **THE COURT:** Well, the problem is, we have a unique
6 situation here, where we a woman was killed on the Pier and
7 that is a very explosive aspect of the case, but it's not what
8 you have charged the defendant with.

9 **MR. BARRY:** No.

10 **THE COURT:** So it's incumbent on all of us to strictly
11 limit the amount of focus that this trial has on the death of
12 Kate Steinle and the details of her death. And I am concerned
13 that you're not getting that.

14 **MR. BARRY:** No, we understand it perfectly, Your
15 Honor. But the -- this is not necessarily one of these -- like
16 the Court saw the transcript. You reviewed the transcript and
17 how the evidence came in. The evidence comes in differently.
18 We have to be able to put on that evidence.

19 And the notion that, you know, an eyewitness heard a
20 gunshot, looked over and saw someone on the ground, and then
21 saw someone else leaving the scene is critical to say why that
22 person is the one involved in the shooting. And the reason
23 that's important is because that's how he possessed the gun.

24 So we have to be able to tell that story. But, again, we
25 are not looking to inflame the passions of the jury. We don't

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1 want a reversal in the event of a conviction on that basis.

2 We are going to be very clinical about the fact that there
3 was a shooting. Yes. And the reason that's important is
4 because, for whatever reason, the defendant pulled the trigger.

5 We're not going to prove his intent. We're not getting
6 into ballistics. We are not going there. But we have to be
7 able to say, "This is what happened on the Pier." These
8 eyewitnesses were there. Their attention was drawn to a
9 gunshot, or something that sounded like a gunshot. They see a
10 person on the ground. They see people converging on that
11 person trying to render aid. And then they see someone else
12 quickly walking away. And that's what motivated them to bring
13 these photographs to the police, and that's why the police
14 arrested the defendant.

15 And this is a quick story. But we're not -- we completely
16 understand that. We are not trying to say there was a murder
17 and, therefore, convict this person. We don't -- we will not
18 go there. We don't want that.

19 The defendant is entitled to a fair trial, but the
20 Government is also entitled to put on its case in the best way
21 it can without inflaming the passions of the jury. And so, you
22 know, Ms.-- I don't anticipate that any of these witnesses are
23 going to say, "Oh, you know, it is a tragic thing. Somebody
24 needs to be punished for it." This is what I saw and this is
25 what I did.

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1 **THE COURT:** I keep saying, "I'm concerned about X."

2 And then you keep saying, "We're not going to do Y. Don't
3 worry, we're not going to do Y."

4 I'm not concerned that the witness is going to say, "This
5 is a tragic thing and somebody is going to be punished for it."

6 Why do you -- every time I say, "I'm concerned about X,"
7 why do you respond by saying, "We're not going to do Y"?

8 **MR. BARRY:** Because the reason --

9 **THE COURT:** Are you being evasive or --

10 **MR. BARRY:** No, Your Honor. I think it's a conclusion
11 that you're concerned about X. So the result would be to limit
12 our witnesses' testimony. And I think that that is the -- we
13 appreciate the Court's concern about that this is going to be a
14 murder trial and it's not.

15 **THE COURT:** Well, I'm hoping that I'm going to hear
16 something from you that gives me comfort that you're not trying
17 to put on a murder trial. But, if you go back and you -- have
18 you reviewed the transcript of the state court trial?

19 **MR. BARRY:** Yes.

20 **THE COURT:** And have you reviewed the transcript,
21 Danny and Michelle Lo's testimony and the arguments that the
22 prosecution made about Danny and Michelle Lo's testimony?

23 **MR. BARRY:** I have not reviewed that carefully. I
24 reviewed their testimony. I have, Your Honor.

25 **THE COURT:** Once you do that, you will become

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1 concerned about their -- I would hope that you would become
2 concerned that a good deal of what Danny and Michelle Lo said
3 in that case is not relevant to this case.

4 **MR. CHENG:** Yes, Your Honor. And having reviewed that
5 testimony, it is not our intent to be, again, just like
6 Mr. Barry said, we're not calling them to talk about, this is
7 what, you know, this is what the defendant's emotions were at
8 the time we saw him, this is how I felt about him. That's not
9 what we're calling the for.

10 We're simply talking about getting in there, talking about
11 what they saw, what they heard, and the photographs that they
12 took that they provided to the police, because they saw this
13 man, in their view, taking off.

14 **THE COURT:** That's the important part of it; right?
15 After the gun went off, they saw that, you know, everyone else
16 is looking this way, and he is walking quickly that way.

17 **MR. CHENG:** Exactly, Your Honor.

18 **MR. BARRY:** And to get to the Court's point as well,
19 about the impeachment. And the Court may recall that I
20 think -- at least, Ms. Lo was impeached on this in trial. "You
21 say he looked determined or he looked angry and you never said
22 that before." That's one of the reasons we're not going to get
23 into that.

24 **THE COURT:** That's beside the point. The point is
25 that it's not relevant.

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1 **MR. BARRY:** Exactly.

2 **THE COURT:** The fact that she was previously impeached
3 on something not relevant to this trial doesn't matter. What
4 you should be focusing on is what's relevant to this trial.

5 **MR. BARRY:** Absolutely. But it's another reason why
6 we're not going there.

7 **THE COURT:** Okay. Who else?

8 **MR. SERRA:** Wait. Again, from my perspective,
9 obviously, I'm agreeing with the Court's questions and implied
10 ruling. On the other hand, if the Los testify, they will be
11 testifying that, you know, the person was shot and that should
12 be forbidden fruit. We shouldn't have to hear that part of it.
13 Other parts, yes, relevant --

14 **THE COURT:** Well, you're not saying that the jury
15 should not learn that a person was shot; are you?

16 **MR. SERRA:** We did do an in limine motion in that
17 generic category.

18 **THE COURT:** But you wanted -- this whole time you have
19 wanted this trial to be about how -- I mean, you approved a
20 jury questionnaire in which we inform the prospective jurors
21 that Kate Steinle was shot.

22 **MR. SERRA:** I saw it and I think it was 21, and I
23 wrote a note "object", and I don't know whether you objected or
24 not.

25 **THE COURT:** I mean, this whole, we have all operated

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1 on the assumption this whole time that it was you who requested
2 jury questions along these lines. I mean, you submitted a
3 whole list of questions that involved informing the jury that
4 this is a case about Kate Steinle being shot. So I never -- it
5 never would have dawned on me that you would take the position
6 that the jury should be prevented from learning that
7 Kate Steinle was shot. I mean, I totally agree that this needs
8 to be drastically limited.

9 **MR. SERRA:** The way the Court has framed some of the
10 in limine responses, I'm agreeing with the Court. And it will
11 come out, but it shouldn't be emphasized and shouldn't be, I
12 don't know, highlighted and --

13 **THE COURT:** Yeah, I certainly agree a thousand percent
14 with that.

15 **MR. SERRA:** You say that and I accept that.

16 **THE COURT:** Yeah. Okay.

17 Who else?

18 **MR. CHENG:** Your Honor, next on our list in
19 alphabetical order, Craig Dong, from the San Francisco Police
20 Department. He was an officer --

21 **THE COURT:** What was the last name?

22 **MR. CHENG:** Dong, D-o-n-g.

23 **THE COURT:** Okay.

24 **MR. CHENG:** He was an officer that immediately
25 responded to the scene and received statements from some of the

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1 eyewitnesses we just spoke about. He was the one who also put
2 out the be-on-the-look-out to the police department to look for
3 the defendant. And he was the officer who collected the video
4 evidence from the nearby fire station, as well as along the
5 Pier.

6 **MR. SERRA:** The only part I would be objecting would
7 be the hearsay statements of witnesses.

8 **THE COURT:** And your response to that is?

9 **MR. CHENG:** The witnesses will have already testified,
10 and they are not going to be -- anything that Officer Dong
11 talks about in that vain, will not be for the truth of the
12 matter asserted, but for the effect on him in sending out the
13 BOLO.

14 **MR. SERRA:** The effect on him is irrelevant. His
15 state of mind is irrelevant.

16 **THE COURT:** That seems correct.

17 **MR. BARRY:** Your Honor, if there is a hearsay
18 statement that's elicited in direct testimony, then that's the
19 time to object to it.

20 **THE COURT:** No, I think it's good to -- I think, given
21 the sensitive nature of this case, it's good to front as many
22 of these issues as we can. And that's why we're going through
23 the exercise that we're going through right now.

24 So why is that -- why does Dong need to testify about the
25 statement that he received from witnesses?

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1 **MR. CHENG:** I think more important is that the
2 photographs that he received from the witnesses, and the reason
3 why he thought these photographs were relevant to send out to
4 the police department.

5 So that's what Officer Dong is going to be talking about
6 in that very short -- the short introduction to why he is even
7 involved with the case. He responded to the scene. He spoke
8 with witnesses. He received photographs from them. He sent
9 out a be-on-the-look-out to the police department. And he
10 subsequently retrieved video evidence that was showing what
11 happened at the scene.

12 **THE COURT:** Obviously, I understand the retrieval of
13 the video evidence, but, I mean, it may be that some of this we
14 may need to deal with during trial. But there is going -- I
15 can tell that there is going to be a point at which I am saying
16 to you, you have got to stop putting on testimony about why you
17 were looking for Garcia-Zarate. It's obvious why you were
18 looking for Garcia-Zarate. And nobody is disputing that you --
19 nobody was disputing -- nobody is suggesting that you were
20 looking for the wrong guy.

21 And so, you know, a little bit of that, maybe, is okay.
22 But at some point you're going to get cut off. So, I mean,
23 who -- we don't need 10 witnesses getting up and testifying
24 about why the police were looking for Garcia-Zarate. It's
25 going to be obvious to everyone and uncontested why the police

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1 were looking for Garcia-Zarate.

2 Craig Dong. Who else?

3 **MR. CHENG:** There is Officer Scott Hurley.

4 **THE COURT:** Scott what?

5 **MR. CHENG:** Hurley, H-u-r-l-e-y.

6 **THE COURT:** Okay.

7 **MR. CHENG:** He is an officer with the San Francisco
8 Police Department. He was the diver who recovered the firearm
9 from the Bay at the spot that it was thrown by the defendant.

10 **THE COURT:** Okay. So he wasn't on the scene. He just
11 went -- just went and got the gun afterwards.

12 **MR. CHENG:** That's correct.

13 **THE COURT:** Okay. Who else?

14 **MR. CHENG:** Next we have Albert Larochelle, who is
15 employed at Sig Sauer. We expect to tender him as an expert in
16 firearms who inspected and tested the gun and its safeties for
17 their operational ability.

18 **THE COURT:** This particular gun?

19 **MR. CHENG:** Yes, Your Honor.

20 **THE COURT:** Okay.

21 **MR. CHENG:** We also have Andy Smith from the
22 San Francisco Police Department Criminalistics Laboratory.

23 **THE COURT:** Okay.

24 **MR. CHENG:** He was at the lab and he inspected the
25 weapon immediately after it was pulled from the Bay.

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1 **THE COURT:** What's he going to say?

2 **MR. CHENG:** He performed an inspection of the weapon
3 in the condition it was retrieved from the Bay. He reviewed
4 the bullets that came from the weapon and compared them to the
5 bullets -- the bullet that was taken from the deceased, and
6 confirmed that that is from the same weapon. He also confirmed
7 that the gun was --

8 **THE COURT:** Is that -- just while we're at it, this is
9 something I mentioned in my order, is that -- is the defense
10 stipulating that the bullet that killed Ms. Steinle is the
11 bullet that came from this weapon?

12 **MS. BELYI:** I mean, I think that we would, but --

13 **MR. SERRA:** The answer is, yes.

14 **MR. BARRY:** That -- actually, we're happy about that.
15 Then there will be no photographs. There will be no commentary
16 on that, just that "I retrieved this bullet from Ms. Steinle's
17 body and it is the same bullet -- it was fired from the same
18 gun."

19 This is excellent from the Government's perspective.

20 **THE COURT:** And the defense said it was stipulated.

21 **MR. BARRY:** If it's a stipulation reading, then again
22 that's even better.

23 **THE COURT:** Does that obviate the need for Andy Smith?

24 **MR. BARRY:** No. Because he would also testify about
25 the condition of the gun as he found it, and that the only way

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1 that you -- a bullet can be shot from this gun is by pulling
2 the trigger, which is directly relevant to the defendant's
3 possession.

4 **THE COURT:** I see.

5 **MR. BARRY:** And in light of one of the defense motions
6 in limine, the -- if we can have Mr. Smith testify that there
7 was no DNA of any kind on the firearm, that I think would
8 address the defendant's concern about no DNA expert and no DNA
9 evidence. So if he is able to testify to that, hopefully, that
10 will address the defense's concern too.

11 **THE COURT:** So you're saying -- you're proposing that
12 if Smith can testify that there was no DNA evidence, and if the
13 defense doesn't object that he is not qualified to testify to
14 that --

15 **MR. BARRY:** Right.

16 **THE COURT:** -- then that will obviate the need to call
17 a DNA expert who would testify that there is no DNA evidence on
18 the gun.

19 **MR. BARRY:** That's right.

20 **THE COURT:** You don't have to give an answer now, but
21 do you have an answer to that now?

22 Do you want to not object to Smith testifying that there
23 was no DNA evidence so they don't have to call their DNA
24 expert?

25 **MR. SERRA:** I proffer a stipulation on that subject.

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1 No DNA.

2 THE COURT: So you'll -- you can have a stipulation --
3 you'll agree to a stipulation there was no DNA evidence on the
4 gun?

5 MR. SERRA: Yes, Your Honor.

6 THE COURT: Okay. So there is an agreement to have a
7 stipulation that there was no DNA evidence on the gun.

8 There is also a stip that the bullet that killed -- the
9 bullet that killed Ms. Steinle came from that gun.

10 MR. SERRA: The Government's position is that they
11 don't have to stipulate. They may want to prove it, regardless
12 of my proffer to stipulate.

13 THE COURT: What's that?

14 MR. SERRA: They may want to prove it. They may not
15 want to stipulate.

16 THE COURT: They just said they are happy to have that
17 stipulation.

18 MR. SERRA: What about the previous one?

19 THE COURT: I think they said they are happy to have
20 both stipulations, the stipulation that -- I may have -- if I
21 misheard, you can correct me if I'm misremembering, they are
22 happy to have the stipulation that there was no DNA evidence on
23 the gun, and they are happy to have the stipulation that the
24 bullet that killed Ms. Steinle came from that gun.

25 Is that right?

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1 **MR. SERRA:** So the Court to the prosecution, you're
2 agreeable to that -- those two?

3 **MR. BARRY:** Yes, Your Honor. But just let me --
4 because I don't -- let me clarify how that would be set up.

5 So we will introduce the bullet into evidence and then we
6 would probably read the stipulation.

7 And for the DNA, we just want to set it up with two
8 questions. And that -- did you have this -- the firearm
9 prepared for DNA testing, or swabbed for DNA. Yes.

10 And then the stipulation would be, there was no DNA found
11 on the weapon at all.

12 So we would need the foundational question of --

13 **THE COURT:** Just to show that the officers tried.

14 **MR. BARRY:** Exactly. Exactly.

15 **THE COURT:** Sounds fine. Okay. Get those written up.

16 **MR. BARRY:** Again, we will have to introduce the
17 bullet into evidence. So I just don't want to make the -- I
18 don't want to have those questions make the Court think we're
19 going back on our agreement. He won't get into the testing.
20 We won't get into the striations. We just agree that this is
21 the same bullet. The bullet was fired from this gun.

22 **THE COURT:** Who else?

23 See? We're paring things down quite well today.

24 **MR. CHENG:** Yes, Your Honor.

25 Next we have Lisa Strick. She is an additional eyewitness

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1 by the Pier. She was not at the Pier, but she heard the
2 gunshot. She very observed an arc and a splash at the same
3 spot that's been identified where the defendant was standing,
4 sitting, and then him standing, and taking off from the scene.

5 **MR. BARRY:** And with respect to the Court's concerns
6 about what the eyewitnesses will testify to, she will not talk
7 about that a body fell.

8 She did not realize what had happened. So she will not be
9 offering testimony that wouldn't -- possibly inflame the jury.

10 **THE COURT:** Okay.

11 **MR. BARRY:** So let me, again, she heard sirens and
12 came back. And then gave the police the information that she
13 had. But she won't be talking about the actual scene or
14 Ms. Steinle dropping, or anything like that.

15 **THE COURT:** And did she take photos, did you say?

16 **MR. BARRY:** She took photos. She gave the photos to
17 the police, but the photos were essentially useless.

18 **THE COURT:** Okay. All right. Who else?

19 **MR. CHENG:** Your Honor, you have already ruled on the
20 inclusion of Mr. Steinle, which Mr. Barry will address.

21 And then we also have two potential custodians of records,
22 which we hope that will be obviated by stipulation or
23 authentication by affidavit. But that would be Tracy Watkowski
24 from ABC, and someone --

25 **THE COURT:** About the video?

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1 **MR. CHENG:** About the ABC video.

2 **THE COURT:** Okay.

3 **MR. CHENG:** Correct.

4 **THE COURT:** What's her name?

5 **MR. CHENG:** Tracy Watkowsky.

6 **THE COURT:** Okay.

7 **MR. CHENG:** As well as a custodian of records from the
8 district court for the arraignment audio.

9 And we have already moved in limine on that issue.

10 **THE COURT:** Right. Okay. Who else?

11 **MR. CHENG:** And then, finally, with respect to the
12 police interrogation of the defendant, Mr. Tony Ravano from the
13 police department.

14 **THE COURT:** Remind me his name again.

15 **MR. CHENG:** Anthony Ravano.

16 **THE COURT:** Romano?

17 **MR. CHENG:** Ravano. I'm sorry, Your Honor.

18 R-a-v-a-n-o.

19 **THE COURT:** Okay. And Officer Ravano was the one
20 asking questions of Mr. Garcia-Zarate in English?

21 **MR. CHENG:** He is one of the officers asking questions
22 in English.

23 **THE COURT:** Okay. And that's the -- so that's the
24 only person you have testifying about the interrogation?

25 **MR. CHENG:** Yes, Your Honor.

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1 **MR. BARRY:** And we also anticipate, Your Honor, that
2 he will just be the authentication and foundation witness, just
3 that -- this is the video of the interrogation and --

4 **THE COURT:** I see.

5 **MR. BARRY:** And that's where we'll leave it.

6 **THE COURT:** Okay. All right. So those are your
7 witnesses?

8 **MR. CHENG:** Yes, Your Honor.

9 **THE COURT:** All right.

10 Okay. Should we talk about the motions in limine now?

11 **MR. BARRY:** If Your Honor wants to address, again --

12 **THE COURT:** Oh, Steinle? Yeah.

13 **MR. BARRY:** Yes. So here is -- there were two
14 photographs.

15 And could you give one to Mr. Serra.

16 There were two photographs that were introduced in the
17 state court through Mr. Steinle. This is one. The other one
18 is a selfie that Kate Steinle took.

19 The selfie doesn't really give you a sense of where they
20 were on the Pier, so we're not seeking to introduce that
21 photograph. But this is one of the pieces of evidence that the
22 Government thinks is important and that we would seek to
23 introduce through Mr. Steinle.

24 And the reason it's important is to show where they were
25 on the Pier, like right before the shooting, because that

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1 establishes a lot of things for the video -- again, what he is
2 wearing. So if this is deemed admissible that's one of --

3 THE COURT: What who is wearing?

4 MR. BARRY: I'm sorry. You can see that Mr. Steinle
5 is wearing white. And, again, the video shows two people in
6 the zoomed-up portion, one of them wearing darker clothing, one
7 of them wearing white, and the person falling, and the other
8 person going to them.

9 So we want Officer Dong to be able to say definitively
10 that those were the Steinles. And that's one of reasons we
11 would need to admit this photograph, and one of things we would
12 need Mr. Steinle's testimony for. Again, I appreciate that he
13 will not be coming in. But I still think this is important
14 evidence that we would like to put --

15 THE COURT: So you're asking -- sorry.

16 So I want to make sure what you're requesting.

17 You're not requesting that Mr. Steinle come in to testify
18 that this is a photo of him.

19 MR. BARRY: No.

20 THE COURT: You're asking Officer Dong to testify that
21 this is a photo that was taken by Kate Steinle, I take it?

22 MR. BARRY: Yes. If -- actually, if we could do that
23 both through Officer Dong. So two things that Officer Dong
24 would be. One is that this exhibit is a photograph taken by
25 Kate Steinle shortly before the shooting depicting James

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1 Steinle and a family friend standing in the area where
2 Ms. Steinle was shot. That's it.

3 And then the second thing would be a question to
4 Officer Dong on the video "Based on your investigation, were
5 you able to determine who the individuals on the right in the
6 video of the Pier, one of them falls down, who they were?"

7 And the answer "Yes, Kate Steinle and her father, James
8 Steinle."

9 And that will obviate the need for Mr. Steinle's
10 testimony. Again, I understand that he won't be coming.

11 **THE COURT:** Any response on that?

12 **MS. BELYI:** Actually, I don't actually know if the
13 photo is necessary because there is that video of -- as Your
14 Honor mentioned, where somebody is walking down the Pier and
15 somebody is falling down. I think that actually shows exactly
16 where everybody is located and pinpoints this. I don't think
17 there is a need for this photo. So I think we would object to
18 having this photo entered into evidence at all.

19 **THE COURT:** Well, I certainly get your point about the
20 attempt to use this photo to establish where they were on the
21 Pier. I mean, this photo doesn't even really tell you exactly
22 where they were on the Pier, because we don't --

23 **MS. BELYI:** We don't have the time.

24 **THE COURT:** We don't have a perspective on where
25 the -- we don't have the whole pier in the photo, so we can't

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1 tell.

2 **MR. BARRY:** But, Your Honor, you sort of do because --

3 **THE COURT:** Hold on a second.

4 **MR. BARRY:** I'm sorry.

5 **THE COURT:** If the -- certainly, if the only purpose
6 of the photo was to establish where they were on the Pier, I
7 would say it's not -- it's not relevant. It's not coming in.

8 The additional question I have, I guess is, the other
9 reason that he has given to include this photo is to establish
10 that Mr. Steinle was wearing white, wearing a white sweater.
11 That's the other reason that he has given.

12 What's your response to that?

13 **MS. BELYI:** I question the relevance of that. I don't
14 think it's relevant what Mr. Steinle was wearing, especially
15 given that we are, as the Court indicated, are not focusing on
16 the killing of Kate Steinle. And I think that what they are
17 going to be able to establish through video evidence is that,
18 at some point, that family is walking, somebody falls down, and
19 somebody is getting up. And that's all that they need to show
20 and that's all that they need to establish.

21 **THE COURT:** Okay. Well, so, obviously, all in limine
22 rulings are subject to revisiting at trial depending on how the
23 evidence comes in. So if the evidence starts to come in
24 differently from how I'm anticipating it, maybe this photograph
25 would be admissible. But, based on how I anticipate the

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1 evidence to come in based on my review of the state court trial
2 transcript, and all the papers that have been filed in this
3 case, I don't think this is necessary. And it's not -- it's
4 excluding it under Rule 403.

5 **MR. BARRY:** Then, Your Honor, for the questions then
6 for Officer Dong with respect to the video, if there is a
7 foundational objection, would the Court overrule that and allow
8 him to testify that those are people in the video?

9 **THE COURT:** I mean, I can't -- I'm not sure I can
10 answer that in the abstract. My anticipation is that none of
11 that is going to be contested.

12 Okay. So anything else before we turn to the motions in
13 limine?

14 All right. So as often occurs, many of the motions in
15 limine have five different issues baked into them, so you know,
16 going in order is always a little bit hard. But maybe we'll
17 start with trying to go in order and start with the defendants
18 as I did in my order yesterday.

19 So the prior convictions. I mean, the only one where, you
20 know, it is I think somewhat of a close question is the one
21 from less than 10 years ago. My thinking on it was that its
22 relevance is just not, you know, is just not high enough to
23 justify allowing you to impeach Mr. Garcia-Zarate with it if he
24 testifies. But I'm happy to hear you take another crack at
25 explaining why it should come in.

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1 **MR. CHENG:** Yes, Your Honor. And there are two prior
2 convictions of the defendant. We highlight the conviction in
3 2011, but there were two prior convictions that fall within the
4 10 years under 609/609(b). That would be the conviction for
5 reentry of a deported alien previously convicted of an
6 aggravated felony. He was released in 2009, so his release
7 date actually falls within the 10 years described in 609(b).

8 **THE COURT:** I thought you said there was only one.

9 **MR. CHENG:** I apologize. That was missing from our
10 initial motion, but that is included in his criminal history
11 that was provided to the Court. So that is the first
12 conviction.

13 The second --

14 **THE COURT:** Okay. Why don't we limit ourselves. You
15 filed a motion you said "Here is one conviction that was within
16 10 years."

17 Let's limit ourselves to that one for now. Why should
18 that one come in?

19 **MR. CHENG:** Well, Your Honor, if -- and, again, we are
20 only seeking to introduce this if the defendant takes the
21 stand --

22 **THE COURT:** I understand.

23 **MR. CHENG:** -- and puts his credibility at issue. And
24 under the tests for a conviction that doesn't involve
25 dishonesty, there is a balancing test under 609(a)(1)(b), and

1 that's just the probative value outweighs the prejudicial
2 effect. It's not substantially outweighs the prejudicial
3 effect.

4 **THE COURT:** Right. And so I'm just questioning what's
5 the probative value of it.

6 **MR. CHENG:** Well, Your Honor, to the extent the
7 defendant does take the stand and puts his credibility at
8 issue, the fact that the defendant was recently convicted of
9 this felony for which he served a substantial amount of time
10 and then was released. And very shortly afterwards there is
11 the conduct in this case. That is relevant to their -- the
12 jury's determination of the witness' credibility if he takes
13 the stand and says he didn't possess this weapon.

14 And under the balancing test, there is enough distinction
15 between the conviction for an illegal reentry to the
16 possession, so that it should not be prejudicial to the
17 defendant. And, again, because if the defendant does take the
18 stand, his credibility will be central to the case because he
19 will be up there saying, "You know, what the Government says
20 that I did was false."

21 **MS. BELYI:** Well, from what it sounds, it also sounds
22 like the Government is going to be using the propensity
23 evidence. I don't believe this conviction is actually
24 relevant, nor is it probative given the stipulation that we
25 have entered into basically stating that Mr. Garcia-Zarate was

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1 illegally in this country and that he has a prior felony
2 conviction. So all of that the jury would come in knowing, and
3 I don't think any particular -- so I don't think that this has
4 actually any probative value. I think it's prejudicial and I
5 think it is actually a waste of time.

6 **THE COURT:** Could I ask you -- I wouldn't have been
7 shocked if you had argued, "You know what, bring it in, because
8 we're already stipulating that he has a prior felony conviction
9 and we're also stipulating that he is undocumented. So why
10 don't we let the Government cross-examine on this so the jury
11 doesn't know that he previously had a firearm offense or that
12 he previously killed somebody. And that all it was,
13 quote/unquote, was he -- a prior conviction for illegal
14 reentry."

15 **MS. BELYI:** But, I guess we're coming into this case,
16 and as the Court knows, Mr. Garcia-Zarate was found to be not
17 guilty of any murder, nor does his conviction for possession of
18 a weapon stand in the San Francisco Superior Court. All of
19 that -- that was overturned. So we're not coming --

20 **THE COURT:** I'm talking about the priors. Right? I
21 mean, you have stipulated that he is a felon.

22 **MS. BELYI:** Yes.

23 **THE COURT:** So, I guess, I was -- part of me was
24 wondering if you were going to say, "Well, the jury is going to
25 be wondering what felony he previously committed. And so if

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1 they want to cross-examine him and establish that the felony
2 that he previously committed was illegal reentry, then that
3 actually might be good for us."

4 And then the flip side is, maybe it's not terribly
5 prejudicial for the Government to be able to cross-examine him
6 on that as they want to. Maybe they don't want to anymore. I
7 don't know.

8 **MS. BELYI:** Theoretically, that is -- I did not think
9 about that, Your Honor.

10 **THE COURT:** Doesn't that diminish the prejudice to
11 Mr. Garcia-Zarate, the fact that you have already stipulated to
12 it and the fact that the jury might be wondering if he
13 previously committed murder, or previously committed a firearms
14 offense?

15 **MS. BELYI:** That is a fair question. I didn't look at
16 it from that perspective. And I think that's a fair question.

17 **MR. SERRA:** I think it's a moot issue. We have no
18 issue of putting him on.

19 **THE COURT:** Oh. Okay. Well, I'll -- nonetheless, I
20 suppose there should a ruling on it. So I'll give it a little
21 bit more thought and -- before I put out my final ruling.

22 Okay. What other aspects of defendant's Motion In Limine
23 Number 1 do we need to discuss?

24 **MR. SERRA:** Well --

25 **THE COURT:** Oh, yeah. This is where you ask to

1 exclude evidence that she was shot and killed. We have
2 discussed that.

3 **MR. SERRA:** Yes. And I merely reregister our
4 objection to the rationale utilized for your ruling, that the
5 shooting is inextricably intertwined with the possession
6 charge. I don't think that's true at all.

7 **THE COURT:** Okay. I understand your argument, but I
8 disagree with it.

9 Does -- have you all thought about maybe this is -- maybe
10 now is the time to talk about this.

11 The substantive jury instruction -- and I haven't been
12 able to give you a draft of what I propose. I'll put out a
13 draft.

14 **MR. SERRA:** You're referring to the limiting
15 instruction?

16 **THE COURT:** What do you think about a limiting
17 instruction?

18 **MR. SERRA:** That's wonderful. Thank you.

19 **THE COURT:** I'll take a crack at drafting a limiting
20 instruction on Kate Steinle's death.

21 **MR. BARRY:** So, Your Honor, that would be in the
22 context of the other crimes, like the defendant is only charged
23 with this crime, nothing else? Would it be sort of in that
24 framework?

25 **THE COURT:** I don't know. When I sit down in earnest

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1 with jury instruction, I'll give some thought to where it's
2 best placed.

3 And -- but I wanted to at least advise you before trial of
4 my view that there is -- and I'm happy to hear argument about
5 it now, if you want. But I want to advise you before trial of
6 my view so that you can build your strategy around it, that
7 there is not going to be a separate affirmative defense
8 instruction, but the defense is not going to be precluded from
9 arguing that this version of events does not constitute
10 possession, does not constitute knowing possession.

11 **MR. SERRA:** Yes. So we acknowledge that you didn't
12 say that, and we're thankful, I guess, you know, for that
13 amount. But that's very different than the affirmative defense
14 of transitory possession.

15 You understand that at the state level, the reversal was
16 predicated on the failure to give that instruction.

17 I know that federal law is different, but this is a
18 situation that, as argued by my colleague in the in limine
19 motion, that differentiates itself because of the factual
20 matrix from the -- you know, the prohibition of the appellate
21 court.

22 So, you know, we wanted that -- if I was going to be
23 frustrated over your rulings, that -- it would be a big one.

24 And the second big one we'll get to is whether you're
25 going to allow the statement that he made before the magistrate

1 in. And I think your tendency is probably not to, but we'll
2 get to that one.

3 THE COURT: Okay.

4 MR. SERRA: Those are the two big ones in my mind.

5 THE COURT: Okay. So let me ask you a couple of
6 questions about this affirmative defense issue.

7 MR. SERRA: Yeah.

8 THE COURT: Number one, I think that one confusing
9 aspect of the discussion about this affirmative defense
10 instruction -- and it's not just from you guys, it's from the
11 case law. I think the cases don't do really a good job of
12 separating these concepts out. But there are -- I think there
13 are two concepts embedded in the -- what we're -- what you're
14 arguing about.

15 One concept is, like, necessity. And the other concept is
16 transitory. Right? And those two are not necessarily linked.

17 MR. SERRA: I don't get necessity.

18 THE COURT: So necessity would be -- I'd say "All
19 right. I'm a felon. And I see a child reaching for a gun and
20 I grab the gun and pull it away."

21 MR. SERRA: I got it, yes.

22 THE COURT: Right. But then the concept of transitory
23 is, you know, "I only had it for a brief period." Right?

24 "I only possessed it for a brief period. Regardless of
25 why I possessed it." Right?

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1 And those are two -- those are two very different things.

2 And in this case, there is no necessity issue. Right?

3 The only question is whether he had -- I would put it this
4 way. The question is, did he have -- did he ever, sort of,
5 assert control over the weapon.

6 I mean, if you knowingly possess something, it means
7 you've knowingly, like, asserted control over --

8 **MR. SERRA:** Dominion, control, and knowledge; yes.

9 **THE COURT:** Say again?

10 **MR. SERRA:** Dominion and control with knowledge is the
11 definition of possession.

12 **THE COURT:** Right.

13 **MR. SERRA:** I don't have any problem with that.
14 Knowledge is obviously going to be litigated from our
15 perspective.

16 **THE COURT:** I guess I don't understand, like if you --

17 **MR. SERRA:** The need --

18 **THE COURT:** A lot of the discussion about the
19 affirmative defense in these cases is about necessity. Right?
20 And we don't have that here. So, you know, like, I can't
21 remember the name of the Ninth Circuit case where the
22 defendant -- was it *Johnson* maybe.

23 **MR. CHENG:** *Johnson*, Your Honor.

24 **THE COURT:** The defendant tried to argue -- really, he
25 tried to argue necessity -- right? -- that "I found the gun in

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1 the bushes near a school. And I was worried that the children
2 were going to get it. So I took it and I took it home with
3 me. It was by my bedside table. And I was planning eventually
4 on bringing it to the police."

5 It wasn't -- it was a necessity that he was trying to
6 make.

7 But here what you seem to be arguing factually is that "My
8 client never knowingly asserted control over this weapon."

9 Right? "As soon as he realized what it was, all he did was
10 throw it away." Right?

11 So he never -- and so that is not knowing possession of a
12 firearm, when the moment you realize that you have a firearm,
13 you get rid it.

14 **MR. SERRA:** I understand that you're going to give it
15 as an instruction --

16 **THE COURT:** My question is: Why would you want an
17 affirmative -- why would you want to argue that you need to
18 prove that by a preponderance of the evidence?

19 **MR. SERRA:** I understand.

20 **THE COURT:** Why wouldn't you want to argue that they
21 haven't established beyond a reasonable doubt that my client
22 knowingly possessed the firearm.

23 I would think that once you take away the necessity part
24 of it, that arguing for -- you're making a mistake by arguing
25 for an affirmative defense instruction because then you have to

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1 prove it by a preponderance of the evidence. Where, what I'm
2 saying is that you don't have to prove it by a preponderance of
3 the evidence. All you have to do is establish a reasonable
4 doubt.

5 **MR. SERRA:** But, I have that burden at hand, to wit
6 knowledge. And certainly it will be utilized.

7 Why not go have a second -- you know, I can argue both
8 defenses and without necessity, just a transitory, fleeting,
9 momentarily, you know --

10 **THE COURT:** But that's not a defense. I mean, I think
11 it comes -- you know, I would argue that in my example of you
12 grab the gun really quickly to prevent a child from getting it
13 and then you go throw it in the garbage or whatever, you know,
14 I would argue that the defense should get an instruction on
15 that. Right? There should be an affirmative defense.

16 And there is some language in the Ninth Circuit case that
17 you can interpret to, arguably, to the contrary, but it's not
18 clear. And I would say that's an appropriate situation for an
19 affirmative defense instruction. But here, all your facts, the
20 facts that you are articulating, all they did -- they go to, as
21 far as I can tell, is the point that he didn't knowingly
22 possess the weapon, and that's not an affirmative defense.

23 **MR. SERRA:** It was transitory, to throw it away. And
24 that is -- it's a shade different. I think the Court is
25 focusing too much on necessity. It's -- I agree. Forget about

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1 necessity. You know, just think about transitory, fleeting,
2 you know, getting rid of it, you know, forthwith.

3 THE COURT: Yeah. I don't think that's an affirmative
4 defense. Sorry. Go ahead.

5 MS. BELYI: If I may add to it. Because, if, for
6 example, the jury does believe that he had knowledge of the
7 weapon, the cases -- they don't just talk about necessity.
8 They kind of link out innocence, right, an innocent possession
9 of the weapon.

10 If they believe he found the weapon. It was wrapped in a
11 towel or something, and he -- it was possessed innocently for a
12 brief period of time, they might think, even if he knew that,
13 you know, at some point he gained knowledge of what it was and
14 it was an innocent possession, that he quickly got rid of this
15 weapon. So it does add --

16 THE COURT: I guess what I would say is that -- let's
17 use a different -- let's take the hypothetical out of the fact
18 of this case. Right?

19 Let's say I'm standing there and, you know, somebody comes
20 and slips a gun into my back pocket. Okay? And I didn't know
21 that they put a gun in my back pocket. And, you know,
22 60 seconds later somebody said, "What's that gun doing in your
23 back pocket?"

24 And I say, "Oh, my God." And take it out and look at it
25 and throw it away. Right?

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1 I believe that that is not knowing possession of a
2 firearm. Because the only action I have taken is to
3 disassociate myself from the firearm that I did not know that I
4 had. Okay?

5 And I -- that is not an affirmative defense. That is, if
6 the Government charged me with being a felon in possession of a
7 firearm, my argument would be, that's not an affirmative
8 defense. That is -- I was not in knowing possession. The
9 Government did not prove beyond a reasonable doubt that I was
10 in knowing possession of that firearm. And I think that is
11 similar to the facts that you are articulated -- your factual
12 theory of the case here.

13 And so it just doesn't -- it doesn't feel like -- it
14 doesn't seem like an affirmative defense at all. It seems like
15 an argument that the Government hasn't proven its case. So
16 that's my final ruling on that.

17 Did the Government want to say anything on that?

18 **MR. BARRY:** Just one thing, Your Honor, just from
19 something I heard from Mr. Serra. I think that he indicated
20 that he has the burden in this case. And I think the Court is,
21 obviously, dead on in that it would be, no, the Government
22 didn't meet its burden to establish that I knew what it was
23 during the time that I had some control over it.

24 **MR. SERRA:** No, I was referring to the burden of
25 preponderance of evidence if he gave a transitory possession

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1 instruction. He is not giving it, so obviously I'm not going
2 to assume any burdens.

3 THE COURT: Okay. Is there anything else to talk
4 about with respect to defense Motion in Limine Number 1? I'm
5 sort of hoping not, because it is the first of 25 motions in
6 limine that we have to discuss.

7 MR. SERRA: Nothing more than anticipating your draft
8 of the instruction.

9 THE COURT: Okay. Let's see.

10 Number 2 is final.

11 Number 3 is final. My tentative my ruling was final.

12 Number 4, evidence of the gunshot residue. So I will tell
13 you that I did not, I guess, I didn't understand the defense
14 argument for why the evidence of the gunshot residue should
15 come out. It sounded like an argument that you don't, you
16 know, you don't consider the evidence, the Government's
17 evidence to be terribly credible. And, you know -- but that's
18 sounds like it's something for cross-examination. I didn't
19 understand basis for excluding it.

20 So do you want to take another crack at that?

21 MS. BELYI: The basis to exclude. Your Honor is
22 correct that the basis to exclude it was that it didn't appear
23 to be credible, that there are issues with the report that they
24 were -- appeared to be written over with pen, rather than going
25 with the print -- machine printout, but --

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1 **THE COURT:** Oh, and by the way, that reminds me of a
2 question that I posed in my order that we didn't talk about
3 when we were going through the Government's witnesses, which is
4 the -- is the person who prepared that report on the
5 Government's witness list?

6 **MR. CHENG:** Yes, Your Honor, that was Linda Abuan, the
7 first witness that we described.

8 **THE COURT:** Okay. All right.

9 **MS. BELYI:** And so -- but we can go with, you know, if
10 Your Honor wants to go --

11 **THE COURT:** You'll just rip her apart on the stand.

12 **MS. BELYI:** No, we can go with that.

13 **THE COURT:** That tentative becomes final.

14 Where are we? Number 5. 5 was final.

15 6 was final.

16 7 was tentative.

17 Okay. So let me get one thing straight first. Which
18 video are we talking about here? We're talking about the video
19 of the Pier where it shows from afar what happened? Is that
20 the video we're taking about?

21 **MR. CHENG:** That was our understanding, Your Honor.

22 **THE COURT:** So one thing I wasn't clear on was, so
23 there was a -- the raw video footage and then there was an
24 edited version of the video. The edited version of the video,
25 where did those edits come from?

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1 **MR. CHENG:** The edits come from work that Officer Dong
2 did with somebody from NCRIC.

3 **THE COURT:** Was that admitted in the state court
4 trial?

5 **MR. CHENG:** The one without labels on it was admitted,
6 whereas the one with labels was only used during argument.

7 We have provided each of those versions --

8 **THE COURT:** So which version are you proposing to play
9 to the jury? Which video?

10 **MR. CHENG:** Our proposal is to play the zoomed-in
11 version that is excerpted in a very similar way as what was
12 done in the state court trial.

13 **MR. BARRY:** With no commentary.

14 **MR. CHENG:** With no commentary.

15 **THE COURT:** So without the picture of Kate and
16 James Steinle appearing, and without all that stuff?

17 **MR. CHENG:** Correct. That would be what would be
18 introduced into evidence.

19 **THE COURT:** So no labels, no words appearing on the
20 video, just the zoomed-in version of the raw surveillance
21 footage?

22 **MR. CHENG:** Correct.

23 **THE COURT:** Presumably, clips of it; not the entire
24 45 minutes.

25 **MR. CHENG:** That's right, Your Honor.

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1 **MR. SERRA:** In their exhibit list they say "enhanced."

2 Is the enhancement the editing that you're talking about?

3 **THE COURT:** I gather it's the zooming.

4 **MR. BARRY:** That's a good point. Thank you for
5 clarifying that, Mr. Serra.

6 So, the enhancement, all it is, is zoomed in. None of
7 pixels are changed. None of the quality is changed. It's just
8 a focus in on that area. It's enhancement, pure mechanically.
9 It's -- nothing has been edited or altered in any way. It's
10 just to focus on the a certain part.

11 That's a good question. I'm glad you addressed that.

12 **THE COURT:** That's fine. I think the video is
13 appropriate to show and video with zooming is appropriate to
14 show. And, you know, you can pause the video where you need to
15 pause it and all that, that's fine.

16 I just want to make sure that the version of the video
17 where you're showing Kate Steinle's face is not being used.

18 **MS. BELYI:** Just also from our perspective, I think it
19 would just be good, the way that it's being discussed here,
20 before any video -- or maybe, if we can get like a handout for
21 each video what was done. Like, this is a zoomed-in version,
22 just something like that, so we're aware of what the
23 manipulations are. That would just be helpful.

24 **THE COURT:** Well, that should be described --
25 presumably, that would be described by the witness who is used

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1 to put on the video.

2 **MS. BELYI:** That would be fine too.

3 **MR. BARRY:** Mechanically, Your Honor, what we intend
4 to do is to have the witness view the video, in order to
5 introduce it, it would be the same video that the defense has.
6 They will view it. They will sign a disk with it.

7 Then we will present them with the disk. Say, "Do you
8 know what this is?"

9 "Yes, it's a video of the Pier that I took and I zoomed
10 in."

11 And introduce it that way. And we will assert to the
12 defense that it's the exact same thing that they have. So
13 there is -- there would be no confusion about that because that
14 way we could have them look at it on the monitor, just to make
15 sure, before we publish it. But that's the mechanism that we
16 intend to do.

17 **THE COURT:** Okay. Are we going to have the video
18 available to the jury in the jury room during deliberations?

19 **THE CLERK:** We can.

20 **THE COURT:** What are people's positions on that?

21 **MR. BARRY:** We're -- we would like the jury to be able
22 to view it. The question is whether it's going to be court
23 equipment or government equipment, I guess. But we can work
24 that out with the courtroom deputy.

25 **THE CLERK:** It would be court. But your office would

1 set it up in here, and then we push it back to them.

2 **MR. BARRY:** You'll have a cart?

3 **THE CLERK:** Yes.

4 **MR. BARRY:** Okay.

5 **MS. BELYI:** That's, I think that's fine.

6 **THE COURT:** Okay. So make sure -- let's make sure we
7 make arrangements for that.

8 Let's see. Number 8.

9 By the way we'll need to -- we have been going for about
10 an hour and a half. So I guess what I propose we do is, in a
11 few minutes, we'll take a half-hour break, maybe, and people
12 can grab a quick bite and stuff. Then we'll come back. Okay?

13 Let's see. Number 8. Oh, wait. We kind of covered
14 Number 8. Let's see.

15 9 was final. 10 was --

16 **MS. BELYI:** For the record, 8 is final?

17 **THE COURT:** 8 is now final.

18 **MS. BELYI:** Yeah.

19 **THE COURT:** 9, 10, 11, 12, were final. 13, final.

20 Okay. Anybody have anything to say about this? My theory
21 of relevance was that to the extent there is any, you know,
22 concern that this was Garcia-Zarate's gun, the fact that it was
23 stolen from a van nearby, a few days prior -- was it a few days
24 prior?

25 **MR. CHENG:** Yes, Your Honor.

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1 **THE COURT:** Obviates that concern. And I guess is at
2 least somewhat consistent with this -- Mr. Garcia-Zarate's
3 story, or the story that he told in the -- and his lawyers told
4 in the state court trial, that he found the gun there. I mean,
5 arguably it makes it slightly more likely that he did find the
6 gun there.

7 So it struck me that, you know, maybe it -- probably
8 perhaps it doesn't matter that it was a stolen from a
9 government vehicle. I don't know.

10 I mean, I sort of got the sense from the state court
11 transcript that it is inevitably going to come in that it was a
12 government -- you know, the safety being on or whatever, that
13 all that stuff was going to come in.

14 But anyway, so my thinking was that it would be
15 appropriate to allow the jury to learn that the gun was stolen
16 nearby from a car a few days prior, or whatever it was.

17 And it sounds like the Government wasn't intending on
18 arguing that, or implying that Mr. Garcia-Zarate stole the gun.
19 So does -- but maybe that was before you knew what my ruling
20 was going to be about the fact that the gun was stolen.

21 So what do you -- do you have anything you want to say
22 about that?

23 **MR. BARRY:** Yes, Your Honor.

24 So as the Court could see from the transcript of the state
25 court proceeding, there was sort of the whole sideshow, if you

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1 will, about BLM policies, about negligence, about what the BLM
2 ranger did.

3 To avoid that we would propose the following stipulation:
4 First, the parties agree that the firearm in this case had been
5 stolen from the vehicle parked along the Embarcadero on -- I'm
6 sorry the date escapes me, but we'll specify the days.

7 MR. CHENG: June -- we'll provide the exact date.

8 MR. BARRY: Then second: The Government has no
9 evidence that Mr. Garcia-Zarate was the person who burglarized
10 the car and took the firearm.

11 MR. SERRA: You know, we like that. But I think one
12 thing that should be added is it was a government vehicle. Why
13 are we disguising that?

14 MR. BARRY: There is no relevance.

15 THE COURT: It might matter -- I haven't figured it
16 out yet. But it might matter that it was a government weapon.
17 But why would it matter that it's a government vehicle?

18 Why would it matter that it was stolen from a government
19 vehicle?

20 MR. SERRA: Well, from my perspective it -- how would
21 I call it -- disperses culpability. It gives the jury another
22 focus. Was this negligence? You know, was it wanton disregard
23 for the safety of people?

24 I know it's not a civil case, but I think those
25 considerations will flow through the minds of the jurors if

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1 they know that it was a government vehicle. And if it's not a
2 government vehicle, other inferences are possible. They won't
3 know.

4 **MR. BARRY:** And that's precisely why the jury
5 shouldn't hear that, Your Honor.

6 **THE COURT:** I agree.

7 **MS. BELYI:** And --

8 **THE COURT:** I'm sorry. Go ahead.

9 **MS. BELYI:** Just as far as the phrasing, instead of
10 saying that there is no evidence that Mr. Garcia-Zarate was the
11 person that stole it could it be something along the lines of
12 there is -- and I had it my mind and it just kind of slipped
13 out, something along the lines of Mr. Garcia-Zarate is not --
14 there is no evidence or that's not --

15 **MR. SERRA:** Charged.

16 **MS. BELYI:** Just something that's not -- because I
17 feel like saying there is no evidence that Mr. Garcia-Zarate
18 was the person that stole is it sort of implies that maybe he
19 did or didn't, we're not sure. But that's not really the case.

20 I think that there was a series of car thefts along the
21 Embarcadero on that evening. I think it's pretty well
22 determined that it's not Mr. Garcia-Zarate that's the
23 perpetrator in those thefts. So something along the lines of,
24 Mr. Garcia-Zarate is not at all implicated in the theft, or
25 something to make it less -- I feel, like it has a little sound

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1 of legalese technicality, that we have no evidence that he did
2 this.

3 **THE COURT:** What about: The Government does not
4 contend that he stole it?

5 **MS. BELYI:** "There is no contention that he stole the
6 weapon."

7 **MR. BARRY:** That's fine with the Government.

8 **THE COURT:** Um-hmmm.

9 **MR. BARRY:** So the simple one would be: The
10 Government does not contend that he stole it.

11 **THE COURT:** And then -- so I think that all sounds
12 fine.

13 My only additional question about that and, again, from
14 looking through the -- and I haven't read the entire state
15 court transcript, but just to kind of flip through it, there
16 was all this discussion of a hair-trigger. Right?

17 And was there testimony -- I think there was testimony
18 from the BLM person about how the gun was set, and that it was
19 set, you know -- I gathered the Government isn't intending
20 on -- the Government doesn't have him on their witness list.
21 The Government doesn't intend on getting into any of that.

22 **MR. BARRY:** No.

23 **THE COURT:** In that case, I don't think it's relevant
24 that -- I don't think it's relevant that it came from a BLM
25 vehicle. And it -- it may also not be relevant that it was a

1 BLM weapon. Is that correct?

2 **MR. BARRY:** That's correct, Your Honor.

3 The defense will be able to argue based on the trigger
4 pull, like we intend to present evidence of how many pounds per
5 pressure it took to pull the trigger in single-action and
6 double-action mode. And the defense is free to argue whatever
7 they want about that, but they will have those facts.

8 **THE COURT:** Okay. So to be clear on that, you know,
9 sort of tweak this for the final order on the motions in
10 limine, but it's -- there is going to be this stipulation about
11 the fact that it was stolen from a car along the Embarcadero.

12 Can we say anything more specific than "along the
13 Embarcadero"?

14 **MR. BARRY:** We'll work with the defense to -- because
15 I think it was near the ballpark, but we'll nail that down, but
16 specifically where and specifically when.

17 **THE COURT:** All right. But the fact that it was
18 stolen from a government car or that it was a government weapon
19 is not relevant or admissible.

20 **MS. BELYI:** And perhaps part of a stipulation could be
21 that it was part of a -- it appears to be a part of a series of
22 thefts in which Mr. Garcia-Zarate is not implicated.

23 **THE COURT:** That probably -- go ahead.

24 **MS. BELYI:** Well, I think it also -- something that is
25 very common in San Francisco. And I think that that's -- in

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1 that way it particularly disengages Mr. Garcia-Zarate from the
2 theft, that it's -- it's something that happened, that looks
3 like --

4 **THE COURT:** I understand what you're saying. But I
5 think "The Government does not contend that he stole it," is
6 sufficient.

7 **MS. BELYI:** And I just have a brief question, Your
8 Honor. I'm sorry.

9 So we don't -- we're not going to state that it was a
10 particularly -- particular agent, or a weapon that's associated
11 with a particular agency. That's sort of the ruling of
12 the Court?

13 **THE COURT:** Correct. And not only that it's not
14 associated with a particular agency, but also that it's not a
15 government weapon. That does not seem relevant.

16 We're not going to say that it's a government weapon, is
17 what I'm saying.

18 **MS. BELYI:** Okay.

19 **THE COURT:** Okay. So 15 was final.

20 16 was final.

21 17 was final. We're almost through the defendant's.

22 We're going to -- we're going to skip over the arraignment
23 until after the break, because that may take a little longer.

24 **MR. SERRA:** We have 18.

25 **THE COURT:** So the last thing we want to discuss is

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1 18. Then we'll take a break.

2 So what -- this motion was written in very general terms
3 and I couldn't figure out necessarily what everybody was
4 getting at.

5 So what -- what are people getting at? Is there any other
6 concern that you want to articulate about this issue?

7 If, again, the general overlay is that this is not going
8 to be about Kate Steinle's death; right?

9 **MS. BELYI:** And it was a general motion in limine.
10 And I think that the -- I think the Court's ruling is --

11 **MR. SERRA:** I would be objecting that their opinion
12 with regard to whether the responses were credible or not
13 usurps the function of the jury and is irrelevant.

14 **THE COURT:** Well, I don't think we can say that in the
15 abstract. I think it depends on the -- it depends on the
16 question that is asked of the officer, and why the question is
17 being asked and, you know, why it matters whether the officer
18 believed them or not.

19 Again, I mean, I guess I 95 percent agree with you that in
20 a lot of instances that's not going to be relevant or
21 appropriate in this trial. But I can't -- thinking about it in
22 the abstract, I can't definitively say that it's never going to
23 be appropriate. I mean, I can imagine there being some
24 examples where it would be.

25 **MR. SERRA:** Here is what I foresee. In a number of

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1 portions of statements by my client, he says things that are
2 untenable, that he just -- you know, they don't fit the facts,
3 that they are nonsense.

4 So they want to put on, I guess, some of those and ask the
5 officer when -- you know, did you act on this; did you accept
6 this as -- whatever.

7 I don't think that that's the prerogative of an officer to
8 decide. I kind of argued that. But, beyond that, sauce for
9 the goose, sauce for the gander, can we put on, in terms of
10 Doctrine of Completeness, other parts of the statements that
11 were also false, to show that he is confused.

12 **THE COURT:** Right. That's a good -- that's a very
13 good point. Right? And that gets to the issue of -- that's
14 why I said the Government needs to identify --

15 **MR. SERRA:** Yes.

16 **THE COURT:** -- the portions of the interrogation that
17 it wishes to admit so that we can all conduct an examination of
18 those portions to see if they are, you know, if they are
19 misleadingly incomplete. And one way -- you're describing a
20 way in which they might be misleadingly incomplete. But we're
21 not at a point where I can rule on that yet.

22 **MR. SERRA:** We can ask the Government to make a
23 proffer right now.

24 **THE COURT:** I haven't looked at it yet, but I think
25 the Government has now filed, has now identified the portion of

1 the interrogation that it wants to include. Right?

2 MR. CHENG: That's right, Your Honor.

3 THE COURT: And so we were --

4 MR. CHENG: We filed that yesterday.

5 THE COURT: I think I told you in an order to file a
6 response to that by close of business, and we didn't get
7 anything from you.

8 MS. BELYI: I did not --

9 THE COURT: Which is fine. No big deal. There is a
10 lot going on. There is a tight time frame. But we need to
11 take a close look at the interrogation and the portions of the
12 interrogation that the Government wishes to introduce. And we
13 need to take a look at whatever arguments you have about why
14 that's incomplete -- right? -- and then issue a ruling on it.

15 But the ruling is not going to be that the defense gets to
16 go introduce other portions. The ruling is going to be either
17 the Government has to introduce a more inclusive portion of the
18 interrogation, or the Government can't put it in. Okay?

19 So it's not going to be, they get to introduce this,
20 therefore you get to introduce that. It's going to be, if the
21 Government wants to introduce portions of the interrogation, it
22 may have to include other portions of the interrogation for
23 completeness, to avoid a -- presenting the jury with a
24 misleading picture.

25 MR. SERRA: That sounds fair.

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1 **THE COURT:** So that's not something we're going to be
2 able to discuss today. So what I should -- the Government
3 has -- the Government has identified the portions that it wants
4 to put in. Why don't I ask you all to file, by tomorrow, a
5 response to that, any further argument you want to make about
6 it, including identifying portions of the interrogation that
7 you think should be included for completeness.

8 And I know you have an argument that none of it should
9 come in at all, and that's fine. You can make that argument.
10 I assume that I'm going to reject that argument, probably. So
11 you should also include specifically which other portions of
12 the interrogation you believe the Government would need to
13 include to avoid misleading the jury.

14 **MR. SERRA:** As soon as we get their proffer, we will
15 respond.

16 **THE COURT:** You have their proffer. They filed it
17 yesterday. So why don't you file it tomorrow by 5:00.

18 Is that unreasonable?

19 **MR. SERRA:** Do we have the portions they intend to
20 use?

21 **MS. BELYI:** Yeah.

22 **MR. SERRA:** I'm sorry. I just didn't receive those
23 yet.

24 **THE COURT:** No problem.

25 Okay. So that -- so number 18 is sort of on hold,

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1 I guess. We'll treat number 18 as about the interrogation,
2 about, you know, which aspects of the interrogation can come
3 in. And we'll put that one on hold until we get your further
4 argument on it.

5 And then we'll resume after our short lunch break with
6 discussion of the statement during the arraignment. Then we'll
7 get-- and we will discuss whatever else -- whatever else we
8 need to discuss about the Government's motions in limine, we'll
9 do that. And then there may be another couple of issues we may
10 want to discuss.

11 Why don't we return at 20 after 12:00. Want to just make
12 it 12:30? Let's return at 12:30.

13 **MR. BARRY:** Thank you, Your Honor.

14 **THE CLERK:** Court is in recess.

15 (Recess taken at 11:53 a.m.)

16 (Proceedings resumed at 12:37 p.m.)

17 **THE COURT:** Okay. Back at it. The arraignment
18 statement. Maybe I'll hear from the defense first. What do
19 you all -- what do you all have to add about the statement that
20 Mr. Garcia-Zarate made during the arraignment?

21 **MS. BELYI:** From our perspective, Your Honor, we agree
22 with the Court's interpretation, or the Court's view that this
23 statement was essentially an expression of what he was accused
24 of doing and his confusion as to what was going on.

25 **THE COURT:** Well, I said, I guess what I said was

1 that's one way to interpret his statement.

2 **MS. BELYI:** Sure.

3 **THE COURT:** And, I mean, if you just look at the
4 literal words, the literal language, if you take,
5 hyper-literally, what the -- words that he uttered, it sounds
6 like he is saying "This is what I did." But the question is
7 whether in this -- if you consider in context, whether -- what
8 he is really trying to do is describe what he was accused of
9 doing.

10 **MS. BELYI:** Sure. And I think the context is
11 important because right before he says -- right that, you know,
12 right before he says, you know, supposedly what he did, he is
13 also asking whether or not he has one or two interpreters.

14 **THE COURT:** Is he asking whether he has one or two
15 interpreters? I thought he was expressing confusion about
16 whether there were one or two charges. That's how I
17 interpreted it, that he was saying, "Look, I don't understand,
18 like, you know, there was one incident, but there are these two
19 charges that the Government has brought against me."

20 What, you know, there are two charges. That was my
21 interpretation of what he was --

22 **MS. BELYI:** My interpretation was that he was asking
23 whether or not he is going to have one or two interpreters.
24 And I don't have the transcript right in front of me,
25 unfortunately -- oh, thank you.

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1 **THE COURT:** Yeah, I'm pulling it up also.

2 **MS. BELYI:** So --

3 **THE COURT:** One sec.

4 **MR. SERRA:** While she is looking, let me step in for a
5 second. It's all fraught with --

6 **THE COURT:** One quick second. I'm pulling up the
7 transcript also.

8 **MR. SERRA:** Yes. Because, you know, Judge Hixson says
9 (reading) :

10 "Do you understand the nature of the charges against
11 you?"

12 And then he says -- then the Court says -- it sounds like,
13 what I'm gathering is that Mr. Garcia-Zarate is answering in
14 English and then the interpreter is saying, "You have to talk
15 to me in Spanish."

16 And Garcia-Zarate is saying, "Yes, but one or two?"

17 I don't know why he would be saying one or two
18 interpreters. I think he is saying one or two charges because
19 then he later says (reading) :

20 "It's saying that it's just one charge. One charge.

21 It being illegal to have a weapon in my pants."

22 He is talking about one charge versus two charges, not one
23 interpreter versus two interpreters.

24 **MS. BELYI:** I think, as Mr. Serra says, I think it is
25 actually ambiguous in the context, because he could be confused

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1 about both. And he could be confused about -- and I think
2 what --

3 THE COURT: What reason would we have to even suspect
4 that he is talking about one versus two interpreters?

5 MS. BELYI: Because sometimes he has two interpreters.
6 Like today he has two interpreters. And I think what,
7 honestly, the issue here is --

8 THE COURT: But he later explains what he says by one
9 or two -- what he means when he says "one or two." He later
10 says (reading):

11 "It's saying that it's just one charge. One charge."

12 And then the Court clarifies that there is a second
13 charge. Anyway -- okay.

14 But let's -- I think it's probably pretty safe to assume
15 that what he was confused about was whether it was one charge
16 or two charges. But, maybe it's beside the point.

17 MS. BELYI: Then -- well, I don't know. I think it's
18 arguable. I think that what he is confused about is arguable,
19 whether or not it's one charge or two. That's fine too. He
20 might be confused about that. But I think he had -- I think
21 it's clear that he is not in a good state of mind in that
22 point, that he is confused. That he has never expressed
23 confusion before as to his charges I think that is a huge
24 indicator as to his confusion.

25 He is later asking about the amount of deportations. He

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1 is not understanding -- and he is talking about immigration,
2 which is clear that the confusion is coming from the previous
3 court appearance he had that same morning in front of Your
4 Honor, where a lot of the Trump presidency and immigration
5 policy, and how that's going to play into the jury selection
6 process was being discussed.

7 So he is coming in here and he is discussing, you know,
8 we're discussing these issues and then he is coming back out
9 there and he is like, "Well, I'm just not sure what's going
10 on."

11 And, if Your Honor is correct, "How many charges am I
12 facing," you know, "What is happening? Are they charging me
13 with having that gun in my pocket? Or are they charging me
14 with the deportations?"

15 And he is just not clear as to what's going on.

16 And I think admitting this statement -- and I think Your
17 Honor is right, if you're just submitting that particular
18 statement, a literal reading of that could be, well, he is
19 saying that's what happened.

20 But, then, when you look at the context of that entire
21 proceedings that morning -- which I think we would have to show
22 to the jury because that would explain all of his statements.
23 I think that would be -- that shows the cause for his
24 confusion.

25 And I also would point out and we pointed in out in our

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1 motion that the recording is not complete. That was maybe what
2 Your Honor was referring to this morning that sometimes it just
3 doesn't work. So we don't even have a complete transcript of
4 the proceedings to present to the jury and from which to pick.

5 And I understand that the Government's position that they
6 can cherry-pick the statements from the Government with
7 the Court's overview and oversight as to which statements
8 actually get put in, and which context gets put in. But --

9 **THE COURT:** One small question: Is it a problem that
10 there is no record of Mr. Garcia-Zarate saying that he
11 understood the nature of the charges again him? I mean, there
12 is -- all we have is a record of him saying that doesn't
13 understand. And then, apparently, it sounds like they went
14 back in and maybe he said that he understood the nature of the
15 charges against him. But, we don't have a record of that. So
16 all we have is a record of him saying he doesn't understand the
17 nature of the charges.

18 Is that a problem from the standpoint of arraignment?
19 Like, was it a bad arraignment? Does he need to be
20 re-arraigned or something? Has anybody thought about that?

21 I don't know the rules about that. I don't know if there
22 is any significance to the fact that we don't have a transcript
23 of him saying that he understands the nature of the charges
24 against him.

25 Has anybody given that any thought?

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1 **MR. BARRY:** No, Your Honor.

2 **MS. BELYI:** I don't believe that's been considered.

3 **MR. SERRA:** From my perspective, it raises a problem
4 because what we really have here is circumstantial evidence.
5 Is he talking about, you know, what occurred? Of course not.
6 He is talking about, in his mind, what the charges are and he
7 is confusing, you know, possession, it has to be in your
8 pocket. So he is reciting that.

9 But we don't have all the rest. And you need all the rest
10 of the material to infer what the confusion was, how it was
11 sought to be rectified. It would shed more light on what the
12 reasonable interpretation of the pivotal statement is "in my
13 pocket," or words to that effect.

14 So, yes, we're handicapped by not having it. And I think
15 it's clear, and I think your ruling, or your intended ruling
16 hits the nail on the head where you said --

17 **THE COURT:** I said I was undecided.

18 **MR. SERRA:** -- in all likelihood that Garcia-Zarate
19 was merely describing what he was accused of doing, admission
20 of the statement could be unfairly prejudicial.

21 And my perspective, that's exactly what he was doing. It
22 should not be allowed in, Your Honor.

23 **THE COURT:** Okay. Government?

24 **MR. BARRY:** Your Honor, first, in terms of the
25 incompleteness of the recording, the Court has heard nothing

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1 about what's missing. There has been no proffer about, here is
2 the missing part of it, because there was nothing.

3 In my recollection -- and if it's an issue, there were
4 court personnel and court security personnel, that we can call
5 as witnesses, who would say all he was said was "yes" when he
6 was asked the question. So there is nothing to complete the
7 statement here. So incompleteness does not apply.

8 If he needs to be re-arraigned, mechanically we can do
9 that in the next few days. If the defense doesn't waive that,
10 we can always do it again.

11 So let me get to the meat of it. The only basis that I'm
12 seeing for potential exclusion would be this unfair prejudice
13 aspect of it. What we have is a fact. We have the fact of
14 what the defendant said. The Government wants to present the
15 jury with that fact.

16 We don't even need to make inferences based on that fact.
17 We just want to present them with the fact that he said, "The
18 gun I had -- the weapon is it being illegal to have a weapon in
19 my pants, the one that I had that day at Embarcadero in my
20 pants pocket."

21 We want to present that to the jury.

22 It's the jury's job to figure out what that means, what
23 inferences that can be drawn from that. If the defense wants
24 to argue that he was confused, that he what he was really doing
25 was talking about the charges and not about what he did, they

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1 can argue that.

2 **THE COURT:** Well, here is one concern I have about
3 that is -- I have now listened -- you know, I have now watched
4 the video of the interrogation of Mr. Garcia-Zarate. I have
5 watched portions of the ABC interview, portions that you want
6 to introduce and some portions that you don't want to
7 introduce. I have listened to the recording of the
8 arraignment. I have read a variety of transcripts. And I
9 think that I have -- I have one major takeaway from all of
10 that, and that is that a lot of the things that
11 Mr. Garcia-Zarate says don't make a lot of sense. And that he
12 often seems confused, and he speaks with, to put it mildly,
13 imprecision. Right?

14 And so the -- so my interpretation of what he said during
15 his arraignment is colored by my having listened to all this
16 other stuff. But, the jury will not have heard most of that
17 other stuff, presumably; right?

18 And he often -- it often appears -- Mr. Garcia-Zarate
19 answers questions when he clearly doesn't understand what's
20 being asked of him -- right? -- particularly when it's in
21 English. Right?

22 And, for example, there was a portion of the ABC video
23 that you didn't propose -- or maybe you did propose to put it
24 in -- where they ask him "Do you feel badly for killing
25 Ms. Steinle?" And he says "No." And it's obvious that he

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1 didn't understand the question asked of him. And his English
2 is limited. And regardless of language, I think there is a
3 real concern about whether his comprehension is limited.

4 And so, in light of all if that -- in that context -- in
5 that context, I think that the, you know, we -- when you
6 understand that context, you realize it is far less likely that
7 he was making an admission in his arraignment. And far more
8 likely that he was describing what the Government had been
9 accused -- had been accusing him of doing.

10 And so, you know, but the jury is not going to be able to
11 understand all of that. Another related concern, right, is
12 that where does this stuff come about having the gun in his
13 jeans pocket? Where does that come from? That comes from the
14 prosecution in the state court proceeding. If you read the
15 prosecutor's closing argument, which I'm not sure you have
16 done --

17 **MR. BARRY:** I have, Your Honor.

18 **THE COURT:** If you read the testimony about the gun
19 fitting into the jeans pocket, there was a lot about -- the
20 prosecution's theory was he had it in his jeans pocket. Maybe
21 he had it in his coat pocket, the prosecution says. But the
22 primary theory seemed to be that he had the gun in his jeans
23 pocket. But he -- when you understand that, when you realize
24 that, you start to understand that, during the arraignment, he
25 is likely just parroting back what the Government accused him

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1 of doing in the prior trial, what he sat listening to in the
2 state court trial for weeks, I think. The trial went on for
3 weeks; didn't it?

4 So that makes it even more likely that Mr. Garcia-Zarate
5 is merely trying to describe what the Government has accused
6 him of doing, the Government's theory of the case as opposed to
7 what he actually did.

8 So if this statement were to come in, at an absolute
9 minimum, wouldn't all of that other stuff need to come in? So
10 that the defense would explain -- I mean, wouldn't all the
11 dialogue from the state court trial come in so the defense
12 could explain that "No, Mr. Garcia is just parroting the
13 accusations made against him for weeks during the prior trial."

14 Then wouldn't that open up this big Pandora's box about
15 what happened during the prior trial? And isn't that a further
16 argument for excluding it here, given how unreliable
17 Mr. Garcia-Zarate's statements are generally?

18 **MR. BARRY:** No, Your Honor, because, respectfully,
19 that's the jury's call to make. It's the jury's job to figure
20 out what it meant.

21 **THE COURT:** It's my job to decide whether evidence
22 should be excluded on 403 grounds. And I have to exclude -- if
23 I conclude that it is substantial -- that the evidence is
24 substantially more, that the probative value is very low and
25 the prejudicial effect -- unfair prejudicial effect would be

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1 high, I have the discretion to exclude it.

2 And it seems to me, given everything I have just said,
3 that the probative value of his statement is very low, and the
4 potential prejudicial effect is very high because the jury is
5 not going to understand all of the stuff that I understand
6 about Mr. Garcia-Zarate and how he communicates.

7 **MR. BARRY:** But the -- well, let me take a step back.

8 So the probative value of a confession has the highest
9 probative value of anything.

10 **THE COURT:** If it's a confession. But, I think that
11 the possibility that this is an actual confession is so low
12 given everything that just you've just said.

13 **MR. BARRY:** I'm sorry, Your Honor. I disagree with
14 that, because one of -- the other theory about the pants
15 pocket, the reason he said "It was in my pants pocket" is
16 because it was in his pants pocket. I mean, that is the most
17 rational, most logical option.

18 And "Does this have to do with the gun I had?" Again, he
19 didn't say -- he didn't say "The gun that I am accused of
20 having, the prosecution said I have."

21 **THE COURT:** That's because Mr. Garcia-Zarate is often
22 confused. And he is a very poor communicator, which leads me
23 to another question.

24 If Mr. Garcia-Zarate actually said that, do you have
25 any -- if it was actually an admission, do you have any

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1 concerns about his competency?

2 **MR. BARRY:** I do not.

3 **THE COURT:** Why not?

4 **MR. BARRY:** People make mistakes all the time.

5 **THE COURT:** Yes, but, again, let's take the totality
6 of Mr. Garcia-Zarate's communications that we have access to,
7 the stuff that he says in his interrogation, the stuff that he
8 says in the ABC interview, the stuff that he said in
9 arraignment. Wouldn't that -- I would think that would
10 normally give you concerns about whether Mr. Garcia-Zarate
11 understands what's going on around him.

12 I mean, maybe part of it is the language issue. Maybe
13 part of it is an issue with the fact that so often people are
14 trying to communicate with him in English, inappropriately,
15 because it was obvious that he didn't understand English.

16 **MR. BARRY:** He had a translator. At the arraignment
17 he had a translator.

18 **THE COURT:** Yes, but he was --

19 **MR. BARRY:** He had counsel.

20 **THE COURT:** But there was confusion there too because
21 he was -- it seems from the transcript that he was listening to
22 Judge Hixson say what he was saying in English, and trying to
23 respond directly to Judge Hixson, rather than waiting for the
24 interpreter, even though he obviously has a tremendous amount
25 of difficulty understanding what people are saying in English.

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1 **MR. BARRY:** You can hear on the recording.

2 **THE COURT:** Or hopefully that's what it is, and not
3 that he simply has difficulty understanding what anybody is
4 saying regardless of what language it is.

5 **MR. BARRY:** So we are hamstrung a bit in terms of his
6 competency. There has been no motion for competency, with no
7 accusation from the defense that he is incompetent. And the
8 competency bar is extremely high: Does he understand the
9 proceedings and can he participate in his defense?

10 **THE COURT:** The only transcript I have seen is that he
11 didn't understand the charges against him.

12 **MR. BARRY:** He eventually did understand the charges.
13 In fact, he understood them well, and that he talked about,
14 Charge 1: Does this have to do with my carrying a firearm?
15 Charge 2: Does this have to do with immigration?

16 The answer to both those questions is "yes." That's
17 exactly what these charges are about.

18 So in order to get to the notion that it's prejudicial
19 requires a lot of inferences. Because, again, we have got the
20 fact of what he said. If he had said, you know, "Does this
21 have to do with the fact that I'm charged with carrying a
22 firearm," then maybe we're not in this position. Maybe it
23 shouldn't go to the jury because the fact that he is not
24 acknowledging a charge is different than saying, "This is the
25 gun I had."

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1 And, again, that is the most logical option. Like the
2 whole shirt story is just absurd and it's not supported by the
3 evidence.

4 So the most logical option is that he did have a gun in
5 his pants on the Embarcadero, and his acknowledgment of that at
6 the arraignment should be put in front of the jury.

7 If the defense wants to say he is confused, if they want
8 to put him on the stand to show he is confused and they want to
9 ask him what he meant to say, they can do that. But there is
10 no basis to prevent the jury from doing its job. And the
11 jury's job is to figure out what this means.

12 Again, there is a fact. The fact is he said this. What
13 it means is up to the jury. And Your Honor has made that point
14 clear. In other cases you said the jury must be allowed to
15 fulfill its role, even where the evidence is inconclusive or
16 indirect. That was a civil case from a couple of years ago.

17 But time and again in the sufficiency of the evidence
18 standard or context, in the habeas context, the Supreme Court
19 time and again says that (reading):

20 "It's the responsibility of the trier of fact,
21 fairly, to resolve conflicts in the testimony, to weigh
22 the evidence, and to draw reasonable inferences from basic
23 facts to ultimate facts."

24 That's *Jackson versus Virginia*, 443 U.S. 307.

25 **THE COURT:** I'm not sure. I mean, I'm not sure the

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1 relevance of that. The point is that in every -- in every
2 instance, I have to make a decision whether the probative value
3 of the evidence is substantially outweighed by the potential
4 for unfair prejudice. And I just don't --

5 **MR. SERRA:** Your Honor, isn't there another dimension
6 that weighs in on that decision, the 403 decision, is the undue
7 consumption of time. As you indicated, you have to open up the
8 state case, which is now foreclosed, so that we can show the
9 context, the very context the Court has read and explicated for
10 the record.

11 **THE COURT:** Why wouldn't that -- why wouldn't
12 inclusion of that instruction, of this statement necessarily
13 result in the introduction of all of the stuff that the
14 prosecution accused Mr. Garcia-Zarate of in the prior trial?

15 **MR. BARRY:** Because he didn't say that. He said "The
16 gun that I had in my pants pocket."

17 **THE COURT:** But, the context -- it's the context. The
18 context is, what is he being charged with. So it seems likely
19 that what he is attempting to articulate is what the Government
20 accused him of doing. He did it with imprecision. He says
21 everything with imprecision. It's very hard to follow what
22 Mr. Garcia-Zarate is saying oftentimes. And this is one of
23 those times. But from the context it seems quite likely that
24 he was trying to describe what he was being accused of.

25 **MR. BARRY:** Again, I disagree, Your Honor.

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1 And the person -- the body to resolve those disagreements
2 is the jury.

3 So -- and with respect to unfair prejudice, the unfair
4 prejudice prong deals with evidence that is not related to
5 culpability or guilt. It's when stuff is dragged in -- I think
6 "by the heels" the Supreme Court said -- just to dirty up the
7 defendant. The notes from Rule 403 indicate that it's
8 really -- the jury is making a determination of guilt on
9 something improper, like emotion.

10 Here, it's what did the defendant say and what did it
11 mean.

12 **THE COURT:** Yeah, I see what you're saying. That's a
13 fair point.

14 **MR. BARRY:** With respect --

15 **THE COURT:** Let me ask you this.

16 I mean, let's say -- what if the defendant had said --
17 what if Mr. Garcia-Zarate had said "Oh, you mean when I, you
18 know, was carrying the gun on top of my head at the Pier.
19 Balancing the gun on top of my head at the Pier"?

20 Would you be saying he made an admission or would you be
21 saying "That's not reliable because we saw this video and there
22 was no indication that anybody was carrying a gun on top of his
23 head at the Pier."

24 **MR. BARRY:** The video was not clear enough to make
25 that determination.

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1 **THE COURT:** Let's say that it was.

2 **MR. BARRY:** It could be an expression --

3 **THE COURT:** At some point the statement becomes so
4 unreliable we say there was something wrong with what was going
5 on in the defendant's brain when he was saying that, and it was
6 so obviously incorrect that he must not have meant that. He
7 must have meant something else. Right?

8 **MR. BARRY:** We're in the land of "could be." He could
9 have meant this. He could be doing that. That's for the jury
10 to discuss.

11 **THE COURT:** So what about the --

12 **MR. BARRY:** Consumption of time.

13 **THE COURT:** The consumption of time.

14 **MR. BARRY:** So if the defense wants to introduce -- we
15 have a certified copy of the transcript if they want to
16 introduce that portion of the closing argument. It's on
17 page 2443 to 2444. Where, as the Court noted, it wasn't just
18 the accusation or the claim that he had it in his pants pocket,
19 it's that he had it in his jacket pocket. If they want to
20 introduce that portion, or if they want to introduce some of --

21 **THE COURT:** So if they want to introduce the portion
22 that talks about the pants pocket, then you're going to want to
23 introduce the portion that talks about the jacket.

24 **MR. BARRY:** It's part of the same -- it in the same
25 paragraph. It's right after -- it's one page.

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1 **THE COURT:** There is much more than one page on -- one
2 paragraph on the jacket, on the pants pocket, on him putting
3 the gun in his --

4 **MR. BARRY:** Well, there is the testimony where they
5 did that test. But I think there is a succinct section of the
6 closing argument where it's just one page, and it has to do
7 with, that's the claim.

8 And I also note, Your Honor, that this was two years ago,
9 so --

10 **THE COURT:** So?

11 **MR. BARRY:** It was November of 2017.

12 **THE COURT:** So what?

13 **MR. BARRY:** So if we're arguing, on the one hand, he
14 is so confused, he has no idea what's going on, he doesn't know
15 this, but yet he is remembering with precision an accusation
16 from two years ago in the state trial, we can't have it both
17 ways.

18 **THE COURT:** But he is confused about whether there is
19 one count or two. And I understand the one thing I'm being
20 accused of, it's that -- the thing about me being on the Pier
21 with the gun in my pocket, but why are there two counts.

22 That's what he is saying.

23 **MR. BARRY:** Yeah, and then -- but also there is the
24 immigration question. He said the second question, "Does it
25 have to do a with immigration," and it does. So it's clear he

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1 is getting the issue. He is not confused about what the issues
2 are.

3 And, again, it's up to the jury to assess that. And if
4 there are ways -- there is a way to put that he was accused of
5 this, in a prior proceeding, I mean, we can put that transcript
6 in front of the jury. The defense can introduce those
7 portions --

8 **THE COURT:** Then what are we going to say about the
9 prior proceeding?

10 **MR. BARRY:** Say, in a prior proceeding the defendant
11 was accused of carrying a weapon in his pants, and here is a
12 record of it. And there is no consumption of time --

13 **THE COURT:** Presumably, everything in the prior
14 proceeding about whether he was carrying the weapons in his
15 pants or not would have to come in.

16 **MR. BARRY:** I would disagree. Because if the issue --
17 if the issue is that we are surmising that he might have been
18 thinking about the charges, instead of what he actually says,
19 then it's the fact that he was charged, not what the evidence
20 was.

21 **THE COURT:** He might have been thinking about the
22 charges. He was asked if he understood the charges against
23 him. I mean, of course, he was thinking about what the charges
24 were.

25 **MR. BARRY:** I'm talking about the state court charges.

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1 Because, again, what he -- he didn't say that. What he said
2 was, does this have to do, in effect, with the gun I had in my
3 pocket --

4 **THE COURT:** "In effect" is never a good thing to
5 say --

6 **MR. BARRY:** Well, I can read it.

7 Here is what he says. So Judge Hixson (reading) :

8 "What is it that you don't understand?"

9 Mr. Garcia-Zarate (reading) :

10 "It's saying that it's just one charge. One charge.

11 It being illegal to have a weapon in my pants, the one
12 that I had that day at Embarcadero in my pants pocket."

13 So, again, he is not relaying what he was confused of in
14 the past. He is recounting a fact that -- that he did.

15 And if the defense wants to say that's not what he meant,
16 they can do it. But there is no reason to prevent this fact
17 from being presented to the jury where they can argue it. They
18 can determine what it is, because that's their job.

19 **THE COURT:** I understand the argument. I'm not going
20 to rule it on that now. I'm going to think about it a little
21 more.

22 **MS. BELYI:** Just really quickly, a small point. But
23 Mr. Barry insinuated that he understood both charges and that
24 they were talking about immigration. But the charge is not
25 about immigration. The charge is -- he is asking specifically.

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1 He is saying -- and I'm sorry. I'm just reading it from your
2 transcript (reading) :

3 "I think you need to present illegal. You're talking
4 about immigration. You're talking about immigration. The
5 attorney talked about U.S. immigration. They are talking
6 about four deportations to Mexico. That's what they are
7 charging for."

8 So he is not really understanding that the charges are
9 essentially the same. It's just his status while committing
10 the charge --

11 **THE COURT:** And on the topic of not really
12 understanding, I want to go back for a minute to the question I
13 asked about competency.

14 And you, I take it, have viewed all of the video of his
15 interrogation. You've viewed the video of the ABC News
16 interview. You have -- you were at the arraignment.

17 Is there -- should I be concerned that Mr. Garcia-Zarate
18 maybe doesn't understand the nature of the charges against him?
19 And should I be concerned that he cannot meaningfully assist in
20 his defense?

21 **MR. SERRA:** I don't think you should be concerned.

22 **THE COURT:** Why?

23 **MR. SERRA:** Because when we speak with him he seems
24 lucid. He doesn't have a big vocabulary. And I very -- ask
25 simple, short questions. But he is cooperative and I don't see

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1 him as incompetent.

2 **THE COURT:** Would you have any objection -- I don't
3 know if this is appropriate, I'm going to think about it. I'm
4 not going to do it now. But would you have any objection to my
5 having a dialogue with Mr. Garcia-Zarate, of course, outside
6 the presence of the Government and under seal, regarding his --
7 to further satisfy myself regarding his competence to stand
8 trial?

9 **MR. SERRA:** I don't want to agree to anything that
10 might put him in the status of incompetent.

11 **THE COURT:** Why not?

12 **MR. SERRA:** My view is that they go away, potentially
13 forever, until they are restored to competency. That doesn't
14 occur. I suppose there is a manner in which you can litigate
15 it, but you're going to have to have your shrinks and your
16 psychologists to say, you know, that he is now restored.
17 That's a big burden. And I just -- potentially should it ever
18 occur -- again, I am not asking for it and I don't think it
19 should occur. But if he was declared incompetent, he may never
20 get out. Where, here, there is going to be an end to whatever
21 occurs and, you know, go back to Mexico. But there will be an
22 end to it, a day he will see freedom, not necessarily so if he
23 were declared incompetent.

24 **THE COURT:** That's what I figured your answer would
25 be.

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1 Okay. So the arraignment, I'm going to think a little
2 more about this competency issue and I'm going to think a
3 little more about the arraignment issue.

4 Should we turn now to the Government's motions?

5 **MR. SERRA:** Your Honor, let's just go back for one
6 second.

7 **THE COURT:** Yes.

8 **MR. SERRA:** In thinking about it, you may come to a
9 conclusion he should be examined by a professional. That's
10 going to protract our case.

11 **THE COURT:** I don't know. I don't know if it will or
12 not.

13 **MR. SERRA:** They usually want at least 60 days.

14 **THE COURT:** Sixty days?

15 **MR. SERRA:** To evaluate someone. But maybe a federal
16 judge will get faster, you know, response. I don't know.

17 **THE COURT:** Okay. Let me see.

18 Let's go to the Government's motions. I think we have
19 covered Government's Motion Number 2; right?

20 **MR. SERRA:** Yes.

21 **THE COURT:** Let's see. Number 3. We have kind of
22 covered this too, in the sense that we're not going to be able
23 to -- we need to do -- everybody needs to do some more work
24 before we can decide whether the portions of the transcripts of
25 things that the Government wants to introduce should be

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1 admitted, or if they would need to be supplemented in order to
2 be complete.

3 We can kind of gloss -- we can put that aside for another
4 day. You're going to make a filing on that.

5 But, I do want to -- I think we can chat about the
6 ABC News interview, because I don't know -- I mean, first of
7 all, I'm curious what anybody knows about the circumstances in
8 which that ABC News interview took place.

9 I gather this was a jailhouse interview that
10 Mr. Garcia-Zarate agreed to do with ABC News before his trial;
11 is that right?

12 **MS. BELYI:** It was before his trial. I'm just not
13 sure about the circumstances under which it actually came to
14 fruition.

15 **THE COURT:** I mean, how -- I can't imagine that
16 Matt Gonzalez would have allowed for Mr. Garcia-Zarate to be
17 interviewed. So did this happen without his knowledge?

18 **MS. BELYI:** I just don't know. We don't know. We can
19 ask, but we don't know.

20 **MR. CHENG:** Your Honor, our understanding what
21 happened with this interview, it happened on July 5th, about
22 four days after he was arrested, three days after he was
23 arrested. And one thing we do have and have provided in
24 discovery is a consent form he signed consenting to ABC
25 interviewing him.

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1 **THE COURT:** Was it in Spanish?

2 **MR. CHENG:** I believe it was.

3 **THE COURT:** Where is that?

4 **MR. CHENG:** We'll have to pull it up.

5 **THE COURT:** Was anybody from the public defender's
6 office involved in --

7 **MR. CHENG:** I'm not aware of that.

8 **THE COURT:** Okay. So is it possible that -- I mean,
9 the jail was involved in it, presumably -- right? -- Because
10 he was in jail.

11 **MR. CHENG:** He was in jail at the time, Your Honor.

12 **THE COURT:** Could this have -- is it possible that
13 this was allowed to happen without Mr. Garcia's lawyers being
14 notified?

15 **MR. CHENG:** I don't know the answer to that, Your
16 Honor. And I'm not sure he was appointed a lawyer at that
17 point.

18 **MR. SERRA:** The --

19 **THE COURT:** What's that?

20 **MR. SERRA:** Sometimes news media seek interviews and
21 obtain them without notifying counsel, or no counsel yet has
22 made a general appearance. I've had a number of cases where
23 that has occurred.

24 **THE COURT:** So it's possible that this occurred before
25 Mr. Garcia-Zarate had counsel?

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1 **MR. SERRA:** I'm sorry?

2 **THE COURT:** So it's possible that this occurred before
3 Mr. Garcia-Zarate had counsel?

4 **MR. SERRA:** I would only say it's possible. I don't
5 know the answer.

6 **MS. BELYI:** I don't know that it is, if it was
7 July 5th, because that would be more than 48 hours after the
8 incident, and after the arrest. So I imagine the public
9 defender's office would have been assigned to him at that time.
10 And I don't know that they ran the question by the public
11 defender's office.

12 **THE COURT:** And -- it appears the bulk of this took
13 place in English. They were trying to get him to answer in
14 English because I assume that's what they wanted for their news
15 clip for the nightly news.

16 It seems fairly clear that Mr. Garcia -- Mr. Garcia-Zarate
17 did not understand much of what he was being asked, if any of
18 what he was being asked. Many of his answers were nonsensical.

19 Why is -- what is reliable about this? I mean, what --
20 and what is -- how is it -- what is it probative of, in light
21 of everything I just said?

22 **MR. CHENG:** Well, there are two direct issues where he
23 was asked "Do you remember, you know, shooting the gun?" And
24 that is also sort of consistent with what happens, so there is
25 no question about there. "Do you remember shooting the gun?"

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1 And then more specifically "Do you remember tossing the
2 gun in the water?" And he said, "Yes, I remember that."

3 So those are directly probative of his possession. They
4 are completely consistent with what happened based on the
5 evidence. And also even the defense, the defendant's own story
6 at trial, it's all consistent with that.

7 **THE COURT:** But it seems like, again, I have not
8 watched the whole thing. But, I've watched some of the
9 portions of it that you want to include, and some portions that
10 you haven't asked to include.

11 And what they seem to show is that Mr. Garcia-Zarate is
12 giving random answers to the questions being asked of him.
13 Without any apparent regard for whether he is being responsive
14 to the questions. I mean, he is just saying, like, "yes" or
15 "no," kind of randomly in response to anything. He seems
16 disoriented. And he seems like he doesn't understand the
17 conversation he is having with these people.

18 I don't even know if he understands who these people are.
19 It's hard to tell.

20 But maybe that's because they were talking to him in
21 English and he clearly has serious problems understanding
22 English. Or maybe there were more serious problems going on
23 with Mr. Garcia-Zarate that caused him to provide, you know,
24 these random answers to -- that didn't seem to have any
25 relationship to the questions he was being asked.

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1 But either way, I just -- and by the way, they are all,
2 like, totally leading questions. Right? They were trying to
3 put words in his mouth. So I just don't see -- I don't
4 understand why anything in that interview is probative of
5 anything. And, of course, it's -- also seems like it's highly
6 prejudicial.

7 **MR. BARRY:** Again, the prejudice aspect of it, Your
8 Honor, would be like some of the questions like "Do you feel
9 bad about killing this poor woman," we're not looking to get
10 those in. We're not seeking admission of that stuff.

11 **THE COURT:** But they show that -- his answer to that
12 is "no." And what that shows is that he didn't understand what
13 he was being asked. He was just sort of on autopilot, giving
14 answers to the questions he was being asked without regard to
15 what the questions were.

16 **MR. BARRY:** He did say "yes" to that later, but there
17 is actually --

18 **THE COURT:** Right to my point.

19 **MR. BARRY:** But there is a point at which he is
20 actually indicating things that aren't being led to him, where
21 he says "I'm not going to be playing with that anymore," which
22 is a -- maybe even likely what happened. He was playing with
23 the gun and he pulled the trigger without intending to do so.
24 But that's him saying this is what happened. So this is
25 definitely probative of his possession of the gun.

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1 The fact that acknowledges shooting the gun is probative
2 of the possession. And his acknowledgment of his throwing it
3 in the water is definitely probative aspects of what happened,
4 and they show -- particularly "I'm not going to be playing with
5 that anymore" shows he knows what's going on.

6 **THE COURT:** Where is that? "I'm not going to be
7 playing with that anymore"?

8 Is that the portion that you wanted to include?

9 **MR. CHENG:** It is, Your Honor. So if you look at our
10 exhibit that we submitted, that would be Exhibit B to our
11 submission yesterday morning.

12 **THE COURT:** Hm-hmm.

13 **MR. CHENG:** And if you continue, it's the sixth and
14 seventh page of that filing, of that exhibit.

15 **THE COURT:** Okay. So what you're saying is probative
16 is the following exchange (reading) :

17 "How do you say it in English, because I really don't
18 speak it well. That I want to say I'm sorry. Oh, I say
19 I'm sorry, everybody for I know, I no more playing, no
20 more like this, like that in the later."

21 Then the ABC person says (reading) :

22 "You won't play with the guns again. Is that what
23 you said?"

24 And he says "Yeah."

25 That's what you're saying is probative of that?

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1 I mean, that's the other thing. I mean, you're proposing
2 to include not just the -- his statements, but the questions
3 that the ABC person is asking, where they are clearly -- they
4 are speaking to Mr. Garcia-Zarate in a language that he doesn't
5 understand, and they are trying to put -- they are putting
6 words in his mouth?

7 **MR. BARRY:** He doesn't understand it well. He
8 understands it a bit. We saw that in the police interview as
9 well.

10 **THE COURT:** Absent a further -- on this one, I
11 actually think, if I admitted this, that would be an abuse of
12 discretion, at least based on what has been presented to me
13 about this. I actually think it's possible that it would be an
14 abuse of discretion to admit this. But --

15 **MR. CHENG:** Your Honor --

16 **THE COURT:** -- in any event, I am exercising my
17 discretion to exclude it under Rule 403. If the Government can
18 make some showing that it hasn't made about the reliability of
19 this, given everything I have said, you know, maybe I'll
20 reconsider. But, as of now, this video is excluded.

21 **MR. CHENG:** Your Honor, if you just turn to the next
22 page in the excerpts that we proposed, you did have concerns
23 about the defendant not understanding the questions in English.
24 And there a number of examples like this, where the question is
25 asking in English and then immediately asked again in Spanish,

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1 and the defendant confirms the exact same response.

2 THE COURT: Okay.

3 MR. CHENG: And if you look at this example --

4 THE COURT: My ruling stands. I don't think this is
5 even a close question, based on what you've given me. And
6 without having given me anything about the circumstances of
7 this to suggest that it's -- that there is anything reliable
8 about this. So I actually don't think this is a close
9 question. I don't need to hear anything further about it.

10 I'm a little bit surprised you have asked to introduce
11 this, actually.

12 So, anyway, we don't have to worry about the ABC News
13 interview. Although, again, if the Government wants to present
14 more around -- surrounding the circumstances of this interview,
15 I'm actually very curious about it. But, beyond my personal
16 curiosity, I'm not sure that there is going to be any value to
17 discussing it further.

18 So other than that, with respect to the interviews, we're
19 going to put that off. And I'm going to get the defense's
20 response to what the Government has put forward.

21 Let's see. So that sort of leaves, unresolved for now,
22 the Government's Motion Number 3, I guess.

23 Let's see. Number 4. We've talked about that; right? We
24 resolved that.

25 MR. CHENG: Yes, Your Honor. I think you made final

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1 your ruling that there would be no jury instruction on innocent
2 possession.

3 One of the things we just wanted to confirm as well, and
4 we understand Your Honor's ruling that the defendant may argue
5 on the issue of knowing possession, but what we did want to
6 confirm was that the defendant -- the defense should not be able
7 to make an argument contrary to the law, for example, to get up
8 there and say the defendant had an innocent motive when he was
9 possessing the weapon, therefore he should be absolved of
10 liability because that would be contrary to established
11 Ninth Circuit law.

12 **THE COURT:** I -- the jury is going to be instructed
13 that the question they have to answer is whether he knowingly
14 possessed the weapon. So I would be surprised if the defense
15 said that he knowingly possessed the weapon, but it was
16 innocent, because that would presumably result in a very quick
17 conviction.

18 So that's number 4.

19 Let's see, 5A was final. 5B was tentative. The state
20 court proceedings -- I mean, the reason I made the argument --
21 the issue of the state court proceedings, the reason I made
22 that tentative is that in the normal case, there would be no
23 question that we wouldn't be talking about anything that
24 happened in the state court.

25 In the normal case, we wouldn't be talking about anything

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1 that happened in the state court proceedings. And you would be
2 required to, if you're impeaching a witness for a prior
3 statement in those proceedings, you would just refer
4 generically to them as "prior court proceedings" or "prior
5 proceedings" or something like that. "Prior testimony given
6 under oath" is usually how we do it.

7 In this case, obviously, if the -- I think that has to
8 change if the statement from the arraignment came in. But if
9 the statement from the arraignment doesn't come in, I don't see
10 any other reason to bring in anything from the state court
11 proceedings.

12 Anybody want to say -- what am I missing? Okay.

13 So I guess 5B is, you know, remains unresolved until I
14 resolve the question about the arraignment.

15 And then 5D was tentative. Let's see. What was that
16 again?

17 Oh, yeah, we resolved that. Right.

18 **MR. CHENG:** I believe that was addressed by the
19 stipulation the parties discussed.

20 **THE COURT:** And then number 7. We have said that I'm
21 going to think more about the conviction, a little bit more
22 about the conviction that the Government identified in its
23 papers as being from earlier than 10 years ago.

24 So that I think this gets us through the motions in
25 limine. It's been kind of a long day. We have covered what I

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1 think we need to cover before trial regarding the knowing
2 possession, the substantive instructions.

3 Is there anything else we need to discuss today?

4 **MR. CHENG:** Yes, Your Honor. On the jury
5 instructions, you're right with respect to your ruling on not
6 introducing the transitory possession instruction.

7 There are competing instructions on the actual substantive
8 count. The defense has requested that you add additional
9 explanation of what "knowingly" and what "possession" means.
10 Our position is that's not something that should be included
11 there because there already are jury instructions on both
12 knowingly and possession.

13 **THE COURT:** Yeah, but I think we can all probably
14 condense it all into one instruction. So what I'll do is, I
15 will make the attempt to condense it all into one instruction
16 and put it out to you, and maybe we can talk about it. We're
17 going to see each other again on Friday. I'll put out a draft
18 of the substantive instruction, just because I think there will
19 be value in you, you know, we might be able to not totally
20 finalize it, but sort of get close enough that you'll be able
21 to do your thing at trial.

22 **MR. SERRA:** I wanted to ask just a little bit about
23 Friday. We have one -- I'm told we have 110 questionnaires.
24 I'm told we will start at 8:00 and read until 2:00 in court.
25 Is that realistic? Can we finish?

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1 **THE COURT:** I think so.

2 **MR. SERRA:** Yeah?

3 **THE COURT:** I think that's realistic. What we're
4 doing is we're only deciding, on Friday, who is going to be
5 excused on the papers alone. Right?

6 So the only thing we're doing on Friday when I come in at
7 2:00 to meet you all, I'll be back in chambers looking at the
8 questionnaires. You'll be in the courtroom looking at the
9 questionnaires. As I said before, the questionnaires do not
10 leave this courtroom. But we will have a discussion about who
11 is to be excused for hardship on the papers alone, and who
12 should be excused for cause on the papers alone.

13 **MR. SERRA:** That's not my issue. My issue is, I mean,
14 I read fast enough to do 110 in four hours or five hours. I
15 know -- it's to what degree you read it.

16 **THE COURT:** In my experience, it's -- based on my
17 experience, it shouldn't be a problem. It's not because you
18 don't -- you don't have to go through every response to every
19 question. You just need to zero in on, like, two or three
20 questions and glance through the rest to get a sense of
21 whether --

22 **MR. SERRA:** For selection purposes, the way I do it, I
23 read the whole thing. I, you know, mark the areas that I'm
24 sensitive to, and then I grade it on a 1 to 5 basis. It sure
25 as heck takes 10 or 20 minutes a questionnaire for me to do all

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1 that. But, let's just see what happens. I mean, I'll read as
2 fast as I can.

3 THE COURT: Yeah. Well, I mean, I see what you're
4 saying, because we -- you're coming in on Friday and we're
5 going to do our thing on Friday. And then the jury is coming
6 in first thing in the morning on Monday.

7 MR. SERRA: I know.

8 THE COURT: All right. Let me give some thought to
9 that and see if we can figure out a way to buy you a little
10 more time with the questionnaires.

11 MR. BARRY: Actually, the Government shares
12 Mr. Serra's concern on that grounds. But also at times, even
13 though we're ready at 8:00, the jury office has a lot to do.
14 They have got to -- there are a lot of copies to make. We
15 don't get them until 10:00.

16 THE COURT: You're going to have them at 8:00. The
17 questionnaires have already been filled out. They came in
18 today.

19 MR. BARRY: All right.

20 THE COURT: That's one of the things I was wondering.
21 I'll go back and talk to folks about it. I was wondering if we
22 can give you an opportunity to spend some time with the
23 questionnaires tomorrow. Another thing would be to not have
24 the jurors come in until 10:00 a.m. on Monday morning and give
25 you a couple of more hours on Monday morning with the

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1 questionnaires.

2 **MR. BARRY:** Thank you.

3 **MR. SERRA:** Judge, how much oral voir dire do you
4 allow, if any?

5 **THE COURT:** I am -- I tend to be somewhat
6 old-fashioned about that. I tend to prefer to let the lawyers
7 do it, rather than me. So the way -- we can go through the
8 jury selection, the whole jury selection process now if you
9 want.

10 The way I usually do it is -- okay. They will come in.
11 Right? We will have excluded some people on the papers alone
12 for hardship and cause. And they will come in.

13 Let's say we have, you know, 70 prospective jurors. And
14 the first thing I will do is tell them -- you know, I will
15 remind them what the case is about. And I will do hardships.
16 I will talk to people about hardships.

17 And I'll say "Oh, Juror Number 3, you've expressed a
18 concern," and I'll go through and talk to everybody about their
19 hardships. And we'll sidebar and we'll talk about who to
20 excuse for hardships.

21 Everybody, by the way, every prospective juror will remain
22 in the seat they have been assigned that morning. So we're not
23 going to move -- we're not going to shuffle people around. So
24 you can kind of get used to, whoever is in their seat is going
25 to stay in their seat all day.

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1 And Juror Number 1 is on the left against the wall. It
2 goes down to Juror Number 7 and then Juror Number 8 is where
3 Marla is sitting, and that goes to Juror Number 14. And they
4 line up in the rows on the left side there.

5 **MR. SERRA:** And the lineup is the way they will go in?

6 **THE COURT:** Correct, the way they would go into the
7 jury.

8 And then, after hardships, what I will ask them to do is,
9 they will each have a sheet with some few basic biographical
10 questions. It will be a little bit of a repeat from the
11 questionnaire, but we'll figure out which questions we want
12 them to answer orally.

13 And we will ask them to introduce themselves. "My name is
14 so and so; I live in such and such; I work in such and such,"
15 just to get a feel what they are like when they are speaking.
16 And everybody will go around and introduce themselves.

17 Then I will probably ask a few raise-your-hand questions,
18 you know, "Can you follow the law," that type of thing. I'll
19 probably ask -- you know, sort of say what the case is about.
20 And I'll ask people to, you know, if they have a problem being
21 a fair juror in a case like this.

22 Maybe I'll ask some specific questions of a few jurors who
23 are on the -- we were on the fence about excusing on the
24 papers. Maybe I'll do that.

25 And then I'll turn it over to you. And you can have --

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1 each side can have 45 minutes to talk to the jurors.

2 **MR. SERRA:** In your court who goes first, the
3 prosecution or defense?

4 **THE COURT:** I have never given any thought to it.
5 It's always been assumed that the prosecution goes first. But,
6 I have never given any thought to that question.

7 **MR. SERRA:** Okay.

8 **THE COURT:** So unless you object --

9 **MR. SERRA:** I will reserve my view.

10 **THE COURT:** Okay. It's a good question.

11 The only -- so then we, you know, probably, after I do my
12 thing with the jurors, we may have another sidebar. And we may
13 talk about excusing people for cause.

14 So I like to, sometimes, try to get rid of a few of the
15 problematic people before the lawyers do their thing. Right?
16 So you don't have to waste your time on those prospective
17 jurors who obviously are going to be excused for cause.

18 Then you do your thing. Then we'll have another
19 discussion about excusing people for cause. Then we'll -- you
20 can do your peremptory challenges. Then we'll have our jury.

21 And the only other wrinkle for this case is the issue that
22 I think I brought up a little while ago with you guys, which
23 is, you know, what do you think about doing what we did in the
24 Monsanto trial, which was, towards the beginning -- like, after
25 hardships, but before we get into substantive discussion --

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1 create a separate group of prospective jurors who have read or
2 heard about the case, and have a discussion -- excuse the other
3 jurors, have a split discussion with those jurors about whether
4 they can be fair, given what they have heard about the case and
5 make sure to instruct them that they are only to consider the
6 evidence that comes in in the courtroom, blah-blah-blah, and
7 have that discussion only with those jurors, so as not to
8 expose the other prospective jurors to the stuff that those
9 jurors who know something about the case say during jury
10 selection.

11 What do you all think about that?

12 **MR. SERRA:** With a qualification. There is going to
13 be a number who will know something about the case. Out of
14 that number, some will remember a lot and others will remember
15 a little. If you do it openly it, in essence, tells the others
16 who maybe don't know as much as the one you're talking to
17 things that they never realized or don't remember. So I think
18 it has to be done sequestered, one by one, so it doesn't
19 contaminate any of the other jurors.

20 **THE COURT:** I don't believe that's necessary. I mean,
21 maybe if there were like a death penalty case I would consider
22 doing that. But I don't believe that's necessary in this case.

23 The jury will be instructed that none of what anybody says
24 during jury selection is evidence, and they are not -- not to
25 consider it when they are deciding guilt -- guilt or not

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1 guilty.

2 And I think it would be perfectly fine to have jury
3 selection and just have everybody discussing things together.
4 I think that would also be -- that would be fine.

5 But I am sort of offering it as an option to both sides.
6 If anybody wants to argue for this partial sequestration, or
7 whatever you want to call it --

8 **MR. SERRA:** I will argue it right now.

9 **THE COURT:** You would like that?

10 **MR. SERRA:** Yes.

11 **THE COURT:** You want that?

12 **MR. SERRA:** Yes.

13 **MR. BARRY:** I think that's a fine idea. But may I
14 propose one slight change to it, in the interest of saving
15 time?

16 So if we do, like, all of the -- if we do, instead of,
17 like, 30 to 40 minutes each side, initially we do 20 to
18 30 minutes, and then get all of the people for cause. Like,
19 you know, "It turns out I have got religious beliefs that I
20 can't sit in judgment". I hate guns and I will never be fair
21 to a defendant with guns." You know, I think everyone should
22 have -- so those sort of non-case-specific causes.

23 We will be able to sort of winnow out some of them that
24 the Court may know, yeah, this is not the right jury for them.

25 If they know everything about Steinle, the case, they are

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1 gone. So we do sort of the analysis with everyone, without
2 telling them, "If you know something about the case, we're not
3 going to ask you about that now" --

4 **THE COURT:** I understand what you're saying.

5 I think the problem with that is, you know,
6 people's knowledge of the case and thoughts about the case leak
7 out. And so I think the better way to do it is to say: All
8 right. We're talking to you folks as a subset because you have
9 indicated in your questionnaire response that you know
10 something about the Steinle case. And we have separated you
11 out because it's important, when the other prospective jurors
12 come back in, that we don't have any discussion about the
13 Steinle case, because they indicated they didn't know anything
14 about it and we want to keep it that way. But for you -- and
15 so any other general concerns that you have, religious beliefs,
16 feelings about guns, or whatever it is, you'll have a chance to
17 talk about it, but now we're just going to have a discussion
18 about whether or not you can be fair, despite what you have
19 read or heard about the Steinle case.

20 **MR. BARRY:** So that sequestration will be with
21 everyone who indicates knowledge, and it will be very narrowly
22 focused: What do you know about this case and would that
23 affect you?

24 And then do the questioning with everyone else.

25 **THE COURT:** That's the idea. Part of what I will do

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1 in chambers and part of what you will have to do is decide who
2 you think should be part of that mini sequestration.

3 **MR. SERRA:** Right.

4 **MR. BARRY:** Yes.

5 **THE COURT:** So we'll have a discussion on Friday about
6 which jurors we're going to include in that discussion.

7 Anything else about jury selection?

8 **MR. BARRY:** And then the mechanics of cause. Does the
9 Court have the standard Court format with the two for defense,
10 one for the Government, then we go back and forth.

11 **THE COURT:** Yes. You mean for peremptory challenges?

12 **MR. BARRY:** Yeah.

13 **THE COURT:** Yeah.

14 **MR. BARRY:** Will the jurors be here while we're doing
15 that?

16 **THE COURT:** I don't like to do that. What I prefer to
17 do it outside the presence of the jury. So we can do -- we can
18 go back into the conference room back there, if
19 Mr. Garcia-Zarate wants to waive his appearance for that
20 portion of it. If he doesn't, then, I guess, maybe I'll
21 tell -- I'll excuse the jurors and we can do it in the
22 courtroom.

23 **MR. BARRY:** And for whatever it's worth, Your Honor, I
24 think it would be better to do it in the courtroom because both
25 parties will be probably having discussions about who they want

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to strike. And if we are all in the same conference room, there is a -- I don't want to overhear what they say, and I don't want them to hear what we say.

THE COURT: Well, then whisper. I'll give you some time to talk about, you know, put together your strategy, of course, give you a few minutes.

All right. Is there anything else that for us -- that we needed to talk about before Friday?

MS. BELYI: I don't think so.

THE COURT: Okay. Why don't -- thank you for your time. And we will -- why don't we just take a 10-minute -- I apologize to the people who are waiting for the case management conferences, but we have had kind of a long day today.

So why don't we take a 10-minute break. We'll be back in at 10 minutes to 2:00.

MR. BARRY: Thank you, Your Honor.

MR. CHENG: Thank you, Your Honor.

(Proceedings adjourned at 1:43 p.m.)

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2 CERTIFICATE OF REPORTER
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4 I certify that the foregoing is a correct transcript
5 from the record of proceedings in the above-entitled matter.
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7 DATE: Thursday, January 9, 2020
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11 Ruth Levine Ekhaus, RDR, FCRR, CSR No. 12219
12 Official Reporter, U.S. District Court
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